

2004

Utah v. Salvador Torres-Garcia : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Utah v. Torres-Garcia*, No. 20040815 (Utah Court of Appeals, 2004).
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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, :
 :
 Plaintiff/Appellee, :
 :
 v. :
 :
 SALVADOR TORRES-GARCIA, : Case No. 20040815-CA
 :
 Defendant/Appellant. : APPELLANT IS INCARCERATED

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (2003), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Ann M. Boyden presiding.

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FILED
UTAH APPELLATE COURTS
MAR 25 2005

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for one count of murder, a first degree felony, in violation of Utah Code Ann. § 76-5-203 (2003), in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Ann M. Boyden presiding. Jurisdiction is conferred upon this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2002). See Addendum A (Judgment and Conviction).

ISSUES AND STANDARDS OF REVIEW

Issue I: Did the trial court err by denying Torres-Garcia's motion to continue even though the State failed to comply with Utah Code Ann. § 77-17-13 (2003)?

Standard of Review: "A trial court's decision to either grant or deny a continuance is clearly within its discretion" and will not be disturbed "absent a clear abuse of discretion." State v. Tolano, 2001 UT App 37, ¶5, 19 P.3d 400 (citation omitted). However, "[s]tatutory interpretation presents a question of law; 'therefore, [this Court will] review the trial court's rulings for correctness and give no deference to its

conclusions.” State v. Casey, 2001 UT App 205, ¶¶5-6, 29 P.3d 25 (citations omitted).

Issue II: In this homicide case, did the trial court abuse its discretion by admitting evidence that Torres-Garcia possessed drugs and weapons unrelated to the homicide?

Standard of Review: This Court will "review a trial court's decision to admit evidence of other crimes, wrongs, or bad acts for an abuse of discretion." State v. Fedorowicz, 2002 UT 67, ¶24, 52 P.3d 1194 (citations omitted).

PRESERVATION OF ARGUMENTS

Appellant Salvador Torres-Garcia's (Torres-Garcia) argument that the trial court erred by denying his motion to continue after the State failed to provide notice of its expert as required by section 77-17-13 is preserved at Court Record (R.) 255:4-16 (Motion Hearing); and 256:8-16 (First Day of Trial). Torres-Garcia's argument that the trial court abused its discretion by admitting evidence that Torres-Garcia possessed drugs and weapons unrelated to the homicide is preserved at R. 69-70 (Defendant's Motion in Limine); 84-92 (State's Memorandum in Opposition); 116-19 (Findings of Fact and Conclusions of Law); 134-48 (Defendant's Motion to Reconsider); 254 (Motion in Limine Hearing); and 255:20-31 (Motion Hearing).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following statutes and rules are determinative of the issues on appeal. Their text is provided in full at Addendum B.

Utah Code Ann. § 77-17-13 (2003);

Utah Rule of Evidence 401-Definition of relevant evidence;

Utah Rule of Evidence 402-Irrelevant evidence inadmissible;

Utah Rule of Evidence 403-Exclusion of relevant evidence;

Utah Rule of Evidence 404(b)-Evidence of other crimes, wrongs, or acts.

STATEMENT OF CASE

Torres-Garcia was charged with one count of murder, a first degree felony. R. 4-5. Torres-Garcia's co-defendant, Eliazar Babluene-Para (Babluene-Para), was charged with one count of murder or, in the alternative, one count of felony murder. R. 260:20. On December 4, 2003, Torres-Garcia filed discovery requests for a "list of all the witnesses that the State intends to call for trial," and "[p]ursuant to Utah Rule of Evidence 404(b), notice by the State of any other crimes, wrongs or acts it intends to attempt to use in its prosecution of this case, and a list of exhibits, and names and address of witnesses it intends to use to introduce evidence of other crimes, wrongs or acts." R. 15-17. A preliminary hearing was conducted on February 25, 2004. R. 34-35; 253. There, the State called Clara Irwin (Irwin), the wife of alleged victim Todd Irwin (Todd); Juan Carlos Delgado-Cruz (Delgado-Cruz); and Detective James Prior (Detective Prior). R. 253. The State asked Detective Prior if Torres-Garcia was "in the presence of drugs and guns when he was apprehended." R. 253:88. Detective Prior responded, "Within six feet, yes." Id. The State did not call Craig Watson (Watson). R. 253.

On April 15, 2004, the State filed a Notice of Expert Witnesses, revealing its intent to call Watson, Assistant Chief Investigator for the District Attorney's Office. R. 60-62; see Addendum C. The State said Watson would "testify concerning drug trafficking." Id. The notice contained a certificate of delivery signed by the prosecutor saying she had "caused a true and correct copy" of the notice "to be mailed to D. Richard Smith, Attorney for Defendant, at 4444 South 700 East, #101, Salt Lake City, Utah 84107." Id. Torres-Garcia was represented by the Salt Lake Legal Defender Association (LDA), 424 East 500 South, Suite 300, Salt Lake City, Utah 84111. R. 7-8; 14.

On May 17, 2004, Torres-Garcia filed a motion in limine to exclude "[t]estimony regarding the seizure of weapons and drugs at the time of Defendant's arrest" (drug and weapon evidence), pursuant to rule 404(b) of the Utah Rules of Evidence. R. 69-70. On May 20, 2004, the State filed a list of proposed witnesses. R. 105-06, 108-09. This list included Watson but did not identify him as an expert. Id. Also on May 20, the trial court held a hearing on Torres-Garcia's rule 404(b) motion. R. 254. Torres-Garcia argued the drug and weapon evidence was inadmissible because he was "charged with homicide" not possession; the drug and weapon evidence did not contain the drugs or weapon involved in the charged incident; and he had not yet been convicted of possessing the drugs or weapons and, in fact, had an argument that he did not constructively possess them. R. 254:8-15. The State argued the drug and weapon evidence was "relevant to show" Torres-Garcia had a "good" drug business and protected

"his business with the use of guns." Id. at 16. The trial court ruled the drug and weapon evidence was admissible even though it did not represent the "specific guns or specific drugs" involved in the case. Id. at 21-22; see Addendum D. Specifically, the trial court held the drug and weapon evidence was "directly probative of the defendant's intent, preparation, plan, lack of mistake, or accident" because it went "to the State's theory . . . that this murder was based on a drug deal that went very, very bad." R. 254:22. It also went to "proving identity." Id. at 23. Next, the trial court ruled the drug and weapon evidence was more probative than prejudicial because it "is not th[e] type of evidence" to "create hostility." Id. at 23-24. Finally, the trial court warned that the drug and weapon evidence could not be used to show Torres-Garcia was "a drug dealer, or to show that he [was] a murderer," and ordered the State to "prepare a jury instruction." Id. at 25.

The State clarified that it intended to use the drug and weapon evidence to prove Torres-Garcia was "a drug dealer." Id. at 27. Specifically, the State said it intended to call Detective Prior to testify that he found the drug and weapon evidence and that the guns and drugs in the evidence were "not the same guns and drugs" used in the charged homicide; and "Watson, who is an expert in distribution," to show "that these are drugs in amounts of distribution." Id. The trial court then clarified that the State could admit the drug and weapon evidence through Detective Prior and show the drug and weapon evidence was "consistent with drug dealing" through Watson's testimony. Id. at 28.

On May 21, 2004, the trial court entered findings of fact and conclusions of law. R. 116-19; see Addendum E. The trial court held the drug and weapon evidence was probative of "identity, intent, plan, preparation and lack of accident" because "the drugs and guns show a plan, a modis operandi, or scheme engaged in by defendant to conduct and protect a drug business." R. 118. Finally, "the evidence will not be more prejudicial than probative" because "the jury will already hear this evidence through the testimony of state's witnesses" and it will not "raise the jury to overmastering hostility." Id.

On May 24, 2004, Torres-Garcia filed a motion to reconsider the rule 404(b) ruling. R. 134-48. At the motion hearing, Torres-Garcia initially raised an issue of "pressing urgency," regarding "an expert witness which the State indicates their intention to call." R. 255:4. "[F]or the first time Friday I learned that the State intended to call an expert witness." Id. The prosecutor "said that she had indeed filed notice some time back. And we reviewed the docket of the court and saw that some notice had been filed, at least according to the docket, on April 15th of this year. That being said, we still do not have it." Id. at 4-5. Torres-Garcia then moved to continue because "[w]e cannot prepare to meet this expert or consider obtaining our own expert to counter their expert when . . . the requirements of . . . 77-17-13(1)(b)[] have not . . . been followed completely." Id.

The State responded that it would use Watson's testimony for "the 404(b) evidence" and for its "case in chief." Id. at 7-8. Specifically, the State intended to call Watson to show the drug and weapon evidence indicated "distribution." Id. at 8. The

State then argued it gave "notice" and "I'm sorry [LDA has] a problem getting things to the right attorneys, but that's not the State's problem." Id. Finally, the State argued it had fully complied with section 77-17-13(1) because its notice indicated "Watson would be used . . . as a distribution expert." Id. Torres-Garcia then noted that the State's explanation of Watson's testimony, even if he had received the notice, did not notify him "what it was we would have to be able to counter this person on." Id. at 11. Finally, the State revealed Watson was not involved in the investigation of Torres-Garcia's case and his name "was not part of the police reports" provided in discovery. Id. at 12.

After argument, the trial court asked Torres-Garcia if he needed a continuance.

Id. at 15; see Addendum F. Torres-Garcia responded:

[W]e would require additional time. Still we would like to see some sort of summary. I think that maybe once we see that then there would be the necessity of having a Rimmasch hearing or the opportunity at least to consult an expert of our own in some sort of rebuttal. But, you know, we still don't know any more than what has been read into the record, that he's going to talk about drug trafficking. I think it needs to be fuller than that and I think, yes, we do, I guess depending what he says, especially, require additional time.

R. 255:15-16. The trial court then granted Torres-Garcia's motion for a continuance:

I believe that the response of defense counsel at that time was what I needed to have on the record before ruling that in fact the whole underlying purpose behind this kind of notice is expert testimony is so that the opposing party can counter expert testimony, whether that's through testimony of their own witnesses . . . , or a scientific reliability argument. And without any of that being done within the time frame that's necessary, what I'm working in the back of my mind is that

that information really was provided at the Thursday hearing and this testimony may not even be until Thursday of this week, but that undermines the purpose of the rule in notice and I need to rule that in fact the opposing party in this case has stated in good faith and I am satisfied that they would not be able to prepare to counter the expert testimony.

Id. at 16. Next, the trial court denied Torres-Garcia's motion to reconsider its rule 404(b) ruling. Id. at 29-31. Finally, the State decided it would rather "go forward" with the trial and not call Watson. Id. at 33. Accordingly, the trial court ruled that with the "proffer by the State that they are going forward . . . without the expert testimony of [] Watson, then we will continue in the format that we are scheduled for tomorrow." Id.

On May 25, 2004, the first day of trial, the State filed a motion to reconsider the trial court's ruling as to Watson's expert testimony. R. 121; 256:8. The State argued, for the first time, that Watson's testimony fell under section 77-17-13(6). Id. In response, Torres-Garcia argued that subsection six "doesn't say that no notice at all must be given. It says . . . notice must be provided in the due course or regular process of discovery such that it would put us on notice and that the person there would be contemplated as a witness and give us an opportunity to question that person." R. 256:9. "[W]e didn't receive any notice, we weren't aware that this person was contemplated as a witness prior to last Thursday when his name was mentioned in conjunction with our motion in limine." Id. at 9-10. "We have the police reports. There is no report from Watson. So that's not really fair to say that that puts us on notice." Id. at 11.

The trial court then ruled:

[I]t is clear that the ruling that I made yesterday was based on a notice requirement that is not required as to [] Watson. I am modifying my ruling. The testimony of [] Watson has been clearly given through general discovery as well as through the motions that have been discussed at length in court and briefed at length in court.

Also, this is the first day of what is scheduled to be a four-day jury trial. I am going to order that the State not call that witness . . . until defense has had an opportunity to speak with him during the course of this trial. That may mean that the attorneys have to do some work outside the trial time. That is simply a given in a homicide trial.

This homicide trial now needs to be everyone's first priority. There are not going to be explanations given that attorneys need to be in different courts or that they didn't have an opportunity to speak with the witness. The witness is here, the witness is available, and I am ordering him available to all three of the defense counsel so that they may fully and completely brief him and get an understanding of what his testimony is and prepare for that cross-examination.

But because subsection 6 clearly states that the rule in subsection 1(b) does not apply to this particular witness, I am modifying that order. But there still needs to be reasonable notice, there still needs to be a reasonable opportunity for the opposing party to prepare, and that is to occur this week during trial before I will allow [] Watson to be called to the stand.

Id. at 14-16; see Addendum G. In response to the trial court's questioning, the State said it intended to call Watson at "the end of tomorrow." R. 256:16. Consequently, the trial court ruled "the opposing parties are on notice that they need to get that preparation and discussion done tonight, and that will be expected." Id.

The trial court next considered the admissibility of Irwin's eyewitness testimony. R. 256:24. Torres-Garcia argued Irwin's identification was unreliable because she observed the incident while high on cocaine, severely sleep deprived, and under a

heightened sense of anxiety; and her statements were inconsistent. Id. at 26-27. While arguing, Torres-Garcia noted that Irwin had a "heightened sense of anxiety, that coupled with the drugs in her system or maybe the State's expert is also an expert on the drugs, how they affect perception, I don't know." Id. at 27. Finally, the trial court considered the exclusionary rule. Id. at 34. Torres-Garcia argued Watson should be excluded because he was being called to discuss "the broader meaning" of the drug and weapon evidence and his presence in the courtroom would "bolster his testimony." Id. The State responded that Watson was "being called to also testify about drug trafficking in general." Id. The trial court allowed Watson to remain. Id.

Following jury selection, the parties gave opening statements. In his opening statement, Torres-Garcia said Irwin:

has given various statements at various times concerning this incident. She is an eyewitness in this case. . . .

And I've prepared a chart also. There's a few things that are important to pay attention to, many things, but I'm going to highlight some of them and suggest to you that the answers should maybe be consistent from somebody who was present. But listen to the answers, listen to what [Irwin] says about the answers she gave at different times and if those answers change or not: How many people entered the room, the description of those people, the description of the shooter, was he tall, was he short, was he heavy, was he old, was he young, what happened leading up to the shooting, the actual behavior in the room. You heard about someone being struck in the head with a gun. Listen to that.

Importantly, most importantly, the name of the shooter and whether she knew this person or not or had ever seen him before. The description of the shooter, who left the room, when they left the room, and how they left after they left the

room. And there's different cars that will be described and different people going to different cars and a very important description of who left in which vehicle.

....

Ladies and gentlemen, for the reasons I've alluded to and many others, . . . it's going to be apparent to you that there are huge discrepancies and deficiencies in the evidence.

R. 256:147-50.

The State then called Irwin as its first witness. Id. at 152. Irwin was examined and cross-examined on the first day of trial. Id. at 152-218. The State presented its remaining witnesses on May 26, 2004, the second day of trial. R. 258. As Torres-Garcia cross-examined the State's witnesses, he created and displayed a diagram of the discrepancies in Irwin's testimony. R. 258:256-61, 349-54, 368. This diagram included Irwin's contradictory statements about whether Todd demanded money or drugs in exchange for the heroin, Irwin's various names for the shooter, and Irwin's testimony that the shooter drove the gold car Delgado-Cruz normally drove. Id. During his testimony, Detective Prior introduced the drug and weapon evidence. Id. at 293-99. As its final witness, the State called Watson to provide his expert testimony. Id. at 427-42.

At the end of trial, Torres-Garcia objected to the rule 404(b) jury instruction because "it possibly draws more attention to it." R. 258:459. The trial court overruled this objection. Id. at 459-60. Torres-Garcia renewed his objection the next day, arguing a rule 404(b) cautionary instruction is not mandatory. R. 259:477-78. The trial court again overruled Torres-Garcia's objection. Id. at 479. It then instructed the jury:

The State has introduced evidence of other alleged wrongs or acts attributed to the defendant that he is not charged with in the Information in this case. You may use this evidence to show the defendant's identity, motive, plan, preparation, knowledge, intent, opportunity, or absence of accident as to the crimes that have been charged in the Information. You may consider this evidence relating to other acts from the witnesses today solely for the purposes that I've just explained and may not draw from such evidence the inference that the defendant has a character trait that establishes he probably acted in conformity with that trait. Proof that the defendant has engaged in a drug business may not be used to show that the defendant is not a truthful person or that he is a murderer.

R. 194; 259:486.

In closing, the State argued, "Why, you say, would somebody kill someone over \$20? Well, it's more than that. It's to make a point. It's to let people know, you don't mess with me. I have a drug business, I will protect it, you don't mess with me. That's what this was about." R. 259:487, 527-28. Later, in rebuttal, the State argued, "Told you the shooting isn't so much over two or three versus five balloons, it's over[] you don't mess with me, you don't hold my drugs hostage." Id. at 538. Following argument, Torres-Garcia moved "for mistrial based on violation" of the trial court's rule 404(b) ruling. Id. at 551. "In both parts of her closing argument, the prosecutor indicated well beyond what was allowed by this court as to the significance" of the drug and weapon evidence. Id. The trial court denied Torres-Garcia's motion. Id. at 552.

The jury began deliberation at 12:40 p.m. on May 27, 2004. R. 259:549; 260:4. At 5:50 pm, "the jury sent out a written question." R. 158; 260:4. The question read,

"Can we consider what defense attorneys said in an opening statement as evidence? If so, can we get a copy of opening statements?" Id. The trial court responded in writing, "No. Look to Instruction No. 7. No statement or argument of the attorneys is, itself, evidence. Also, Instruction No. 5 explains your responsibility as jurors to determine the facts from the evidence." Id. The jury ended deliberation on May 27 at 8:30 pm and began deliberation again at 9:00 am on May 28. R. 260:5-6. At 9:30 am on May 28, the jury "sent out another written question." Id. at 6. This question read, "Could we see Officer Ricks' testimony, his initial report if you have it?" R. 159; 260:6. The trial court responded in writing, "Jurors need to rely on their collective memory of the evidence. No more reports or documents or evidence after the jury has the case." R. 159; 260:7. At 11:00 am, the jury informed the bailiff that "there was no motion going forward. That they weren't speaking and they . . . felt like they were reaching an impasse." R. 260:7. At 2:20 pm on May 28, the jury reached a verdict. Id. at 18. The jury convicted Torres-Garcia of one count of murder and found Babluene-Para not guilty. Id. at 20-21.

On August 23, 2004, the trial court sentenced Torres-Garcia to five years to life in the Utah State Prison and ordered the sentence to run "consecutively with the prison sentence now serving at Utah State Prison." R. 229-30. On September 20, 2004, Torres-Garcia filed a notice of appeal. R. 233-34. The Utah Supreme Court transferred Torres-Garcia's case to this Court on October 14, 2004. R. 244. Torres-Garcia is incarcerated.

STATEMENT OF FACTS

At trial, Irwin testified she and Todd were staying at the Dream Inn. R. 256:153. She and Todd had a "drug problem." Id. at 155. She prostituted herself to get money for cocaine. Id. at 157-58. She had prostituted herself to Delgado-Cruz at least "twice." Id. at 157-58, 180-81. On September 23, 2003, she called her contact, Fernando, for more drugs. Id. at 156-57. Delgado-Cruz delivered the drugs to her hotel room. Id. at 157. Delgado-Cruz, as usual, was driving a gold Nissan. Id. at 182. While Delgado-Cruz was there, a police officer parked behind Delgado-Cruz's car. Id. at 159. After the officer left, Delgado-Cruz "slipped" a baggie of balloons containing heroin into Todd's shoe and left. Id. at 161. Irwin called Fernando and told him that Delgado-Cruz had left the heroin. Id. at 161-63. Fernando told Irwin he would give her "three balloons of white for returning the package." Id. at 163. Todd "grabbed the phone" and said, "I don't want three, I want five. You don't give me five, I'll flush them down the toilet." Id.

Irwin agreed to meet Delgado-Cruz at a nearby gas station to return the heroin. Id. at 164. Todd went in Irwin's place. Id. Todd returned fifteen minutes later with the heroin and said, "Well, [Delgado-Cruz] told me he didn't have . . . what I wanted, so I told him he couldn't have what he wanted." Id. at 164-65. Fifteen minutes later, someone knocked at the door. Id. at 167. Todd opened the door and five or six men entered. Id. at 167-69. One of the men hit Todd over the head with a gun and "Todd handed him the stuff." Id. at 169-70. The man hit Todd again and said, "This ain't all of

it." Id. at 170. Then Irwin "heard a gunshot" and the men "ran out." Id. at 170-71. Irwin followed the men and saw the shooter drive away in the gold Nissan. Id. at 171. On cross-examination, Irwin admitted she had twice pleaded guilty to providing false information to a police officer. Id. at 177. She also admitted that just prior to the incident she had been ingesting cocaine and foregoing sleep for at least two days. Id. at 196-97. This caused her to "nod off" and have "a difficult time telling" Detective Prior what happened when he interviewed her that night. Id. Further, she admitted that she "heard the gunshot" but did not see the shot fired. Id. at 203-04.

Officer Sonny Ricks testified that he interviewed Irwin at the scene of the incident. R. 258:242. Irwin told him six men entered the hotel room and two were carrying guns. Id. at 243. She did not know any of the men. Id. She identified "Miguel" as her contact but not as the shooter. Id. at 245-46.

Detective Prior testified he interviewed Irwin at the scene, at the police station on the night of the incident, and on November 13. R. 258:266-67. At the first interview, Irwin did not identify the shooter. Id. at 312-13. She explained "what had happened" and identified "Miguel" as her contact but not as the shooter. Id. at 313, 319-20. At the second interview, Irwin said Todd asked for money, not drugs, in exchange for the heroin. Id. at 323. She said six people entered the hotel room and "they started hitting" Todd. Id. at 275, 304, 326. Two of the men were carrying guns. Id. at 328. In response to Detective Prior's question, "One of these people you know as [Delgado-

Cruz] or Miguel?" Irwin said yes. Id. Thereafter, Irwin said she did not see Delgado-Cruz in the hotel room and identified Miguel as the shooter. Id. at 270, 277, 330-31. Early in the interview, Irwin said four people left in a red SUV and two, Delgado-Cruz and someone else, left in the gold Nissan. Id. at 327. Later in the interview, Irwin said Miguel and someone else left in the gold Nissan. Id. at 334, 354.

At the third interview, Irwin said six people entered the hotel room. R. 258:275, 370. She said she could not remember what the shooter looked like but might be able to pick him out of a photo array. Id. at 370-71. She identified the shooter as Fernando. Id. at 271, 373. She said Fernando, Mario, and Miguel were the same person, her contact. Id. at 373, 377. She initially said she had never seen or met Fernando. Id. at 374. Later, she said she had met Fernando "a couple of times." Id. at 375. Detective Prior produced a photo array and told Irwin, among other admonitions, that he had "reason to believe that one of the people pictured in this group of photographs may in fact be one of the people associated with this incident." Id. at 376. Irwin selected Torres-Garcia. Id. at 172, 279. Irwin later identified Torres-Garcia at a lineup. Id. at 172, 286. At the preliminary hearing, Irwin testified she did not know the shooter's name. Id. at 273.

Delgado-Cruz testified that Mario and Fernando employed him as a drug runner. R. 258:398. He identified Torres-Garcia as Mario and Babluene-Para as Fernando. Id. at 399. He said he had sexual relations with Irwin but never paid her for it. Id. at 411-13. Todd was not "pleased with him" and gave him dirty looks. Id. at 411, 414. Delgado-

Cruz and his brother-in-law drove the gold Nissan to the Dream Inn. Id. at 404. Mario, Fernando, and a third man arrived in the SUV. Id. at 404. Mario and the third man carried guns. Id. at 405. Mario, Fernando, and the third man entered the hotel room. Id. Delgado-Cruz saw Mario and the third man hit and kick Todd. Id. at 418. He heard a gunshot but did not see who fired the gun. Id. at 418. He got in the gold Nissan and "Mario got in too." Id. at 405, 420. On cross-examination, Cruz admitted he had been arrested for selling drugs and was hoping to get a better deal for testifying. Id. at 407-10, 420. Detective Prior testified that Delgado-Cruz said during an interview that he drove the gold Nissan from the Dream Inn with his brother-in-law as a passenger, and that Mario, Fernando, and the third man left in the SUV. Id. at 288, 363-64, 366.

Detective Prior testified that, based on information Delgado-Cruz provided during the interview, officers executed search warrants on two residences. R. 258:290, 406. Torres-Garcia and a woman occupied one of the residences. Id. at 290-94. The landlord identified Torres-Garcia as the renter. Id. at 291-92. Officers found the drug and weapon evidence in a closet. Id. at 293-99. Detective Prior testified that the drug and weapon evidence included: cocaine; a bag of pistols and ammunition, including .45 caliber pistol rounds but no .45 caliber pistol; a small electronic scale; a "Seal-a-Meal"; "small party balloons"; \$8,000 in cash; and several cell phones. Id. The cocaine (five "fist-sized packages") and bag of weapons were produced at trial. Id. at 293-97.

Watson testified the drug and weapon evidence indicated street- to mid-level drug distribution. R. 258:434-36. He also testified drug dealers typically have "multiple cars" and runners do not use the same cars; drug users typically use "monetary amounts to represent the amount of drugs they want"; and drug dealers typically use nicknames and change their names "[e]very time they answer the phone." Id. at 437-38. On cross-examination, Torres-Garcia asked Watson one question: "Neither of these two individuals are charged with dealing drugs?" Id. at 442. Watson replied no. Id.

SUMMARY OF ARGUMENT

First, this Court should reverse the trial court's decision to admit Watson's expert testimony without granting Torres-Garcia a continuance because the trial court erred by holding section 77-17-13(6) applied, and abused its discretion by denying Torres-Garcia's request for a continuance under section 77-17-13(1). The trial court erred by concluding subsection six applied. Section 77-17-13 was enacted to ensure a defendant receives enough time and information to adequately prepare to meet adverse expert testimony. The plain language of subsection six says a defendant receives enough time to prepare to meet the expert testimony if he receives reasonable notice of the expert through general discovery. Here, the trial court erred by ruling subsection six applied because the State did not provide reasonable notice of Watson's testimony through general discovery. The trial court also abused its discretion by denying Torres-Garcia's request for a continuance under subsection one. Subsection one requires the State to give

notice of expert testimony at least 30 days before trial. Here, the State did not give the required notice. Moreover, the trial court abused its discretion by denying Torres-Garcia's request for a continuance because he was prepared for trial, his need for a continuance would have been met by granting the continuance, his right to a fair trial outweighed any inconvenience, and the trial court's order prejudiced his case.

Second, this Court should reverse because the trial court abused its discretion by admitting the drug and weapon evidence. Rule 404(b) says evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In this case, the gun and weapon evidence was not admissible under rule 404(b) because it was not offered for a proper, noncharacter purpose, it was not relevant except to show Torres-Garcia had a proclivity to commit the crime charged, and its probative value, if any, was substantially outweighed by the danger of unfair prejudice. Moreover, the trial court's abuse of discretion was prejudicial.

Third, this Court should reverse because the cumulative effect of the trial court's errors undermines confidence that Torres-Garcia had a fair trial. This Court will reverse if the cumulative effect of the several errors undermines confidence that a fair trial was had. Here, the trial court prejudiced Torres-Garcia's case by denying him a continuance to prepare to meet Watson's testimony and admitting the drug and weapon evidence.

Taken cumulatively, these errors undermined Torres-Garcia's defense. Watson's testimony explained away the discrepancies in Irwin's testimony on which Torres-Garcia had built his defense. Watson's testimony also gave expert endorsement to the State's characterization of Torres-Garcia as a dangerous drug dealer who harbored weapons for the purpose of killing anyone who interfered in his drug business. But because the State did not give Torres-Garcia notice of Watson's testimony and the trial court denied Torres-Garcia motion to continue, Torres-Garcia was forced to leave Watson's testimony virtually uncross-examined, thereby solidifying its validity for the jury.

ARGUMENT

I THIS COURT SHOULD REVERSE BECAUSE THE TRIAL COURT ERRED BY DENYING TORRES-GARCIA'S MOTION TO CONTINUE AFTER THE STATE FAILED TO GIVE NOTICE OF EXPERT TESTIMONY AS REQUIRED BY SECTION 77-17-13

This Court should reverse the trial court's decision to admit Watson's expert testimony without granting Torres-Garcia a continuance because the trial court: (A) erred by holding section 77-17-13(6) applied, and (B) abused its discretion by denying Torres-Garcia's request for a continuance when the State failed to provide notice of Watson's testimony under section 77-17-13(1) and the lack of notice prejudiced Torres-Garcia.

A. The Trial Court Erred By Concluding Section 77-17-13(6) Applied.

Section 77-17-13 was enacted to ensure a defendant receives enough time and information "to adequately prepare to meet adverse expert testimony." State v. Arellano, 964 P.2d 1167, 1170 (Utah Ct. App. 1998). The notice requirements allow a defendant

to "prepare to challenge" the expert testimony, "plan[] for effective cross-examination," "consult with his own expert," "obtain[] rebuttal testimony," and "incorporate any new information into the defense strategy." Id. at 1169 n. 2, 1171 (citations omitted); see State v. Rothlisberger, 2004 UT App 226, ¶31, 95 P.3d 1193 (holding expert notice allows defendant to "prepare a witness-specific response to that testimony"), cert. granted, 2004 Utah LEXIS 248 (Utah 2004); Tolano, 2001 UT App 37 at ¶12 (explaining expert notice gives defendant "opportunity to examine the testing procedures," "hire his own expert to challenge the testing procedures," "examine the resumes," and "possibly impugn their qualifications").

In most cases, formal notice is necessary. These cases are governed by subsection one. See Utah Code Ann. § 77-17-13(1). In a few cases, formal notice is not necessary because the circumstances of the case itself provide adequate notice of the State's expert. The Utah Legislature has accounted for these cases by listing exceptions to subsection one's formal notice requirements. See Utah Code Ann. § 77-17-13(5)-(6). One such exception is subsection six, which says the State is not required to give formal notice of:

an expert who is an employee of the state or its political subdivisions, so long as the opposing party is on reasonable notice through general discovery that the expert may be called as a witness at trial, and the witness is made available to cooperatively consult with the opposing party upon reasonable notice.

Utah Code Ann. § 77-17-13(6).

Utah appellate courts have not yet interpreted subsection six. When interpreting a statute, this Court will "seek to give effect to the intent of the legislature in light of the purpose the act was meant to achieve." State v. Ostler, 2001 UT 68, ¶7, 31 P.3d 528 (quotations and citation omitted). In doing so, "this [C]ourt looks first to the statute's plain language to determine the Legislature's intent and purpose . . . read[ing] the plain language of the statute as a whole." State Farm Fire & Casualty Co. v. Sundance Dev. Corp., 2003 UT App 367, ¶4, 78 P.3d 995 (quotations and citations omitted).

By enacting subsection six, the Utah Legislature intended to excuse the State from subsection one's formal notice requirements only where "the general discovery provided by the state gives notice that the expert may be used." Rep. K. Bryson, sponsor, speaking on floor of Utah House of Representatives, H.B. 238, 55th Leg., Day 40, February 28, 2003 (Tape 2, Counter 0839). This intention is clear from the plain language of the statute. The plain language of subsection six says it only applies where the defendant "is on reasonable notice through general discovery that the expert may be called as a witness at trial." Utah Code Ann. § 77-17-13(6).

Reasonable notice under subsection six is notice that gives the defendant information similar to information he would have received under subsection one. See State Farm Fire & Casualty Co., 2003 UT App 367 at ¶4 (holding appellate court will interpret statute by "read[ing] the plain language of the statute as a whole" (quotations and citations omitted)); Arellano, 964 P.2d at 1170 (holding section 77-17-13 was

enacted to ensure defendant receives enough time and information "to adequately prepare to meet adverse expert testimony"). Subsection six simply allows the State to forgo formal notice where notice is adequately given through discovery. See Utah Code Ann. § 77-17-13(6). Thus, reasonable notice under subsection six is notice that informs the defendant of the name, address, and qualifications of the expert; that the State intends to call the expert as a witness; and of the substance of the expert's testimony. See Utah Code Ann. § 77-17-13(1)(b); see Rothlisberger, 2004 UT App 226 at ¶¶30-31 (holding notice must be "witness-specific"). Similarly, requiring the notice to be given through general discovery guarantees that a defendant receiving notice under subsection six, like a defendant receiving notice under subsection one, has adequate time to prepare to meet the expert testimony. See Utah Code Ann. § 77-17-13(1)(a) (requiring State to give notice "as soon as practicable but not less than 30 days before trial"). As explained by rule 16 of the Utah Rules of Criminal Procedure, the State must provide general discovery "as soon as practicable following the filing of charges and before the defendant is required to plead." Utah R. Crim. P. 16(b). Thus, reasonable notice through general discovery, like formal notice under subsection one, is notice that ensures a defendant enough time and information "to adequately prepare to meet adverse expert testimony." Arellano, 964 P.2d at 1170; Tolano, 2001 UT App 37 at ¶12 (explaining notice under section 77-17-13 gives defendant opportunity to examine testing procedures, hire own expert, examine resumes, and possibly impugn qualifications).

In this case, the trial court ruled the requirements of subsection six were met because the "testimony of [] Watson has been clearly given through general discovery." R. 256:15. This conclusion misinterprets subsection six. Although the State provided general discovery, including police reports, to Torres-Garcia, it did not disclose Watson's name or potential testimony in that discovery. R. 255:12; 256:11. Thus, the State did not provide reasonable notice of Watson's testimony through general discovery as required by the plain language of subsection six. Utah Code Ann. § 77-17-13(6). In fact, the State itself recognized its general discovery disclosures did not provide reasonable notice of Watson's testimony. This is evidenced by the fact that it attempted to file formal notice under subsection one and repeatedly referenced its formal notice filing as the reason Torres-Garcia had adequate notice to prepare his defense. R. 60-62; 121; see Arellano, 964 P.2d at 1171 n. 3 (holding State's argument that defendant should have inferred its intention to call expert from expert's name on toxicology report was "belied by the fact that [State] did finally make at least a partial disclosure, albeit twenty-five days late, something that it would not have done if it were truly obvious that [expert] was an indispensable witness" (interpreting Utah Code Ann. § 77-17-13 (1995))).

The trial court also ruled the requirements of subsection six were met because the "testimony of [] Watson has been clearly given through . . . the motions that have been discussed . . . and briefed at length in court." R. 256:15. This is a misinterpretation of subsection six. The first time Torres-Garcia received "any notice" of the State's intent to

call Watson was when the State "mentioned" Watson's name at the motion hearing held five days before trial. Id. at 9-10. This notice did not satisfy subsection six's requirement that reasonable notice be given through general discovery. Utah Code Ann. § 77-17-13(6); see Utah R. Crim. P. 16 (requiring State to provide general discovery "as soon as practicable following the filing of charges"); Arellano, 964 P.2d at 1170 (holding section 77-17-13 was enacted to ensure defendant receives enough time "to adequately prepare to meet adverse expert testimony"). Besides, when Torres-Garcia subsequently objected that he had not received notice of Watson's testimony, the trial court ruled Watson's testimony would not be admitted. R. 255:16. Thus, Torres-Garcia had no reason to suspect Watson would testify until the first day of trial, when the State moved the trial court to reconsider its ruling under subsection six. R. 121; 256:8. Accordingly, the trial court misinterpreted subsection six.

B. The Trial Court Abused Its Discretion By Denying Torres-Garcia's Request For a Continuance Under Subsection One.

As explained above, section 77-17-13 was enacted to ensure a defendant receives enough time and information "to adequately prepare to meet adverse expert testimony." Arellano, 964 P.2d at 1170. Subsection one ensures adequate notice by enacting formal notice requirements. See Utah Code Ann. §77-17-13(1). Subsection one requires the State, if it "intends to call any expert to testify in a felony case," to give notice "as soon as practicable but not less than 30 days before trial." Utah Code Ann. §77-17-13(1)(a).

Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:

- (i) a copy of the expert's report, if one exists; or
- (ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and
- (iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.

Utah Code Ann. § 77-17-13(1)(b). If the State "fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial . . . sufficient to allow preparation to meet the testimony." Utah Code Ann. § 77-17-13(4)(a).

This Court has outlined five factors for determining whether a trial court abused its discretion by denying a defendant's motion to continue. See State v. Begishe, 937 P.2d 527, 530 (Utah Ct. App. 1997). These factors are:

- (1) the extent of appellant's diligence in his efforts to ready his defense prior to the date set for trial; (2) the likelihood that the need for a continuance could have been met if the continuance had been granted; (3) the extent to which granting the continuance would have inconvenienced the court and the opposing party; and (4) the extent to which the appellant might have suffered harm as a result of the court's denial.

Id. (citation omitted).

For example, in Begishe, the State provided notice their expert would testify about seminal fluid but not that the expert would testify about human blood. Begishe, 937 P.2d at 528. At trial, the defendant moved to continue. Id. The trial court denied defendant's

motion but refused "to allow the State's expert to testify until appellant procured his own expert and ran independent tests, thus giving appellant two evenings to prepare to meet the new testimony." Id. On appeal, this Court held the trial court abused its discretion. Id. at 530-31. First, defendant was "fully prepared" for trial. Id. at 530. Second, defendant "needed the continuance to fully analyze the new data." Id. Under the trial court's ruling, defendant was forced to find an "expert hastily" and "did not even have time to conduct additional testing." Id. Third, the State's tardy notice justified "any inconvenience" it suffered by the continuance and any inconvenience to the trial court or jury was outweighed by defendant's "right to a fair trial." Id. at 530-31. Fourth, defendant was prejudiced because his "expert was unable to conduct additional testing." Id. Plus, the "last minute testing precluded the appellant from formulating a trial strategy best calculated to address the totality of the State's case." Id. "In her opening statement, [defense counsel] emphasized that the State had no inculpatory physical evidence. However, in her closing argument, appellant's trial counsel had to counter the physical evidence which the State actually produced and argued alternative reasons for blood appearing." Id. "It is likely defense counsel's credibility in the eyes of the jury was greatly compromised by the prosecution's having introduced evidence of the blood test after she assured them the State had no physical evidence supporting the charge." Id.

Similarly, in Tolano, the State failed to provide notice of its intent to call two experts to "identify the white powder" as controlled substances. Tolano, 2001 UT App

37 at ¶3. Defendant moved to continue but the trial court denied defendant's motion. Id. at ¶¶3-4. On appeal, this Court held the trial court abused its discretion. Id. at ¶¶8-15. First, defendant "exercised appropriate diligence" in preparing for trial. Id. at ¶11. He "interviewed witnesses," "made arrangements to have witnesses," "extensively cross-examined most of the State's witnesses," "made a chart outlining the area where the alleged offense occurred," and "arranged for an interpreter when necessary." Id. Second, defendant "could have been more adequately prepared to meet the expert testimony if the trial court had granted the continuance" because a continuance would have given defendant an "opportunity to examine the testing procedures," "hire his own expert," "examine the resumes," and "possibly impugn their qualifications." Id. at ¶12. Third, defendant's "right to a fair trial outweighed any inconvenience to the court, the opposing party, and the jury that may have been caused by the continuance." Id. at ¶13. Fourth, defendant was prejudiced because the State "inappropriately hindered" defendant's ability to refute the experts' testimony and the experts were "the only evidence establishing that the powder in the packages was a controlled substance." Id. at ¶15.

In this case, the State failed to satisfy the requirements of subsection one. Under subsection one, the State was required to give notice of Watson's testimony at least "30 days before trial." Utah Code Ann. §77-17-13(1)(a). Although the State filed notice with the trial court, it did not serve notice on Torres-Garcia. R. 60-62. Instead, it served

notice on an attorney not representing Torres-Garcia.¹ Id. Moreover, the trial court abused its discretion by initially granting but later denying Torres-Garcia's request for a continuance. Five days before trial, the trial court recognized Torres-Garcia was entitled to a continuance under subsection one because he needed time to prepare. R. 255:16. On the first day of trial, however, the trial court reversed its ruling under subsection six and allowed Watson to testify without a continuance. R. 256:14-16. Rather than considering Torres-Garcia's need for a continuance, as it considered before, the trial court simply ordered the State not to call Watson until the second day of trial. Id. This order, the trial court concluded, would allow Torres-Garcia to brief Watson during recesses, "get an understanding" of Watson's testimony, and "prepare for [Watson's]

¹ This issue is preserved. An issue is properly preserved if "'the court is afforded an opportunity to rule on the issue.'" Hart v. Salt Lake County Comm'n, 945 P.2d 125, 129 (Utah Ct. App. 1997) (citations omitted). Even though the trial court did not specifically observe that the State mailed its notice of expert testimony to the wrong attorney, it carefully considered Torres-Garcia's motion for a continuance based on the State's failure to give notice of Watson's testimony. R. 255:4-16. Torres-Garcia claimed throughout the discussion that he never received notice and, based on this argument, the trial court initially granted Torres-Garcia's motion for a continuance. Id. The fact that the certificate of delivery is addressed to the wrong attorney simply confirms Torres-Garcia's claim that he never received notice and the trial court's ruling that Torres-Garcia needed a continuance. R. 60-62. When the trial court later changed its ruling, it did so only because it misinterpreted the language of subsection six. R. 256:8-16; see supra Part I.A. Besides, even if the issue was not preserved, this Court should reverse because the trial court's error was plain. Error is plain if it "should have been obvious to the trial court" and was prejudicial. State v. Holgate, 2000 UT 74, ¶13, 10 P.3d 346 (citation omitted). In this case, the trial court's error was obvious because the trial court, unlike Torres-Garcia, received the State's notice of expert testimony and accompanying faulty certificate of delivery. R. 60-62. It was also prejudicial. See supra Part I.B.

cross-examination." Id. As demonstrated by the four factors delineated by this Court, the trial court's decision was an abuse of discretion.

First, Torres-Garcia was "fully prepared" for trial. Begishe, 937 P.2d at 528. As demonstrated in his opening statement, Torres-Garcia had prepared a defense that consisted of highlighting the "huge discrepancies" in Irwin's testimony and arguing the discrepancies were explained by Irwin's inattention during the incident due to the large amounts of cocaine in her system, her prolonged lack of sleep, and the intense stress of the situation; and by her loyalty to Delgado-Cruz. R. 256:147-50. To support this defense, Torres-Garcia had "prepared a chart" listing Irwin's inconsistent statements and had prepared cross-examinations that would highlight the discrepancies in Irwin's testimony. R. 256:147-50, 176-214; R. 258:250-61, 300-76, 389-92, 407-420, 424-25. Thus, the need for a continuance "was the fault of the prosecution, not [Torres-Garcia]." Begishe, 937 P.2d at 530.

Second, Torres-Garcia's need for a continuance would have been met if the trial court had granted the continuance. Torres-Garcia "needed a continuance to fully analyze" Watson's testimony and its effect on his defense. Begishe, 937 P.2d at 530. Even though the trial court recognized recesses are busy in homicide trials and the recesses in this case would be particularly busy because defense counsel for both Torres-Garcia and Babluene-Para needed to interview Watson, the trial court limited Torres-Garcia's time to prepare to meet Watson's testimony to the evening recess between the

first and second day of trial. R. 256:14-16. Not only did this require Torres-Garcia to prepare his cross-examination of Watson in extreme haste, it also ignored Torres-Garcia's need to examine Watson's testimony and curriculum vitae, challenge the scientific reliability of Watson's testimony, consult his own expert, and, most important, incorporate the information he learned into his trial strategy. See Tolano, 2001 UT App 37 at ¶12; Begishe, 937 P.3d at 530. A continuance was especially important in this case because Torres-Garcia had no accurate description of Watson's testimony. R. 60-62; 255:8; 256:27, 34. Although the State initially said Watson would only testify that the drug and weapon evidence signified drug trafficking, it clarified on the first day of trial that Watson would testify about "drug trafficking in general." R. 256:34. In fact, the State itself implied Torres-Garcia needed a continuance if its subsection one filing was faulty by arguing defense counsel "should have been able to prepare for [Watson's] testimony" based on the subsection one notice filed over a month before trial. R. 121.

Third, the State's failure to provide notice of Watson's testimony as required by subsection one justified "any inconvenience" the State would have suffered by a continuance. R. 60-62; see Begishe, 937 P.2d at 530. Moreover, Torres-Garcia's "right to a fair trial outweighed any inconvenience to the court, the opposing party, and the jury that may have been caused by a continuance." Tolano, 2001 UT App 37 at ¶13.

Fourth, the trial court's order prejudiced Torres-Garcia because it prevented him "from formulating a trial strategy best calculated to address the totality of the State's

case." Begishe, 937 P.2d at 531. In his opening statement, Torres-Garcia emphasized the "huge discrepancies" in Irwin's testimony and argued these discrepancies revealed that Irwin's identification was not reliable. R. 256:147-50. Torres-Garcia then proceeded to cross-examine the State's witnesses consistent with his opening statement. R. 256:176-214; 258:250-61, 300-92, 407-425. As he cross-examined each witness, Torres-Garcia carefully highlighted the discrepancies in Irwin's testimony, including her inconsistent statements about whether Todd asked for money or drugs in exchange for the heroin, her testimony that Delgado-Cruz usually drove the gold Nissan and the shooter drove the gold Nissan after the shooting, and her use of different names to identify the shooter. Id. Throughout cross-examination, Torres-Garcia displayed and referred to a chart listing the discrepancies in Irwin's testimony. Id.

Following Torres-Garcia's extensive cross-examination of the State's witnesses, the State called Watson. R. 258:434. Watson initially testified about the drug and gun evidence. Id. at 434-35. Watson, however, went on to resolve the discrepancies Torres-Garcia had highlighted in Irwin's testimony. Id. at 436-40. Specifically, Watson testified that drug dealers keep multiple cars and runners do not always use the same car; drug users use "monetary amounts to represent the amount of drugs they want"; and drug dealers use nicknames and change their nicknames "[e]very time they answer the phone." Id. By so testifying, Watson "greatly compromised" Torres-Garcia's "credibility in the eyes of the jury." Begishe, 937 P.2d at 531. The jury obviously remembered and

considered Torres-Garcia's opening statement because it, during deliberation, asked for a copy of the opening statement to review. R. 158; 260:4. Had Torres-Garcia been granted a continuance and been allowed the opportunity to fully explore Watson's testimony, he would have learned Watson could explain the discrepancies on which he was basing his defense. R. 258:434-40. Accordingly, he could have examined Watson's testimony for scientific reliability, examined Watson's expert qualifications, prepared to challenge Watson's explanation of Irwin's discrepancies, planned effective cross-examination to refute Watson's claims, consulted another expert about the discrepancies, or obtained rebuttal testimony. See R. 255:14-16. At the very least, Torres-Garcia could have altered his trial strategy so as to avoid having the credibility of his defense so directly attacked by the State's expert. Begishe, 937 P.2d at 531.

II THIS COURT SHOULD REVERSE BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION BY ADMITTING THE DRUG AND WEAPON EVIDENCE IN VIOLATION OF RULE 404(b) OF THE UTAH RULES OF EVIDENCE

"It is of course fundamental in our law that a person can be convicted only for acts committed, and not because of general character or a proclivity to commit bad acts." State v. Reed, 2000 UT 68, ¶23, 8 P.3d 1025 (citation omitted). "Rule 404(b) governs the admissibility of bad acts evidence." State v. Nelson-Waggoner, 2000 UT 59, ¶17, 6 P.3d 1120. It says:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for

other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Utah R. Evid. 404(b). "In determining whether evidence of prior crimes, wrongs, or bad acts is admissible, the trial court must initially decide whether the evidence is offered for a proper, noncharacter purpose rather than only to show the defendant's propensity to commit the crime charged." Fedorowicz, 2002 UT 67 at ¶26 (citations omitted). "If the evidence is offered for a proper, noncharacter purpose, then the court must determine whether the proffered evidence is relevant under Utah Rule of Evidence 402." Id. (citation omitted). "Finally, the trial court must determine whether the proffered evidence is admissible under Utah Rule of Evidence 403." Id. (citation omitted).

In this case, the trial court abused its discretion by admitting the gun and weapon evidence because: (A) it was not offered for a proper, noncharacter purpose, (B) it was not relevant under rule 402, and (C) it did not meet the requirements of rule 403. Moreover, this Court should reverse because the trial court's abuse of discretion was prejudicial. See supra Part II.D.

A. The Gun and Weapon Evidence Was Not Offered For a Proper, Noncharacter Purpose.

"Under rule 404(b), evidence of other crimes, wrongs, or bad acts must be adduced for a proper, noncharacter purpose to be admissible." Fedorowicz, 2002 UT 67 at ¶27 (citations omitted). "In other words, 'to be admissible, [the] evidence must have probative value other than to show an evil propensity or criminal temperament.'" Id.

(citation omitted). For example, in State v. Allen, 2005 UT 11, 519 Utah Adv. Rep. 3, the defendant was accused of hiring men to kill his wife. Id. at ¶3. The trial court admitted evidence that the defendant used stolen credit cards to purchase items in order to account for the money he was paying the men. Id. at ¶13. Our supreme court held the evidence was admissible because it "directly linked" the defendant to the conspiracy and demonstrated preparation, plan, intent, and knowledge by showing how the defendant "disguise[d] his payments." Id. at ¶¶19 n. 4, 20.

Evidence of drug dealing, like all bad acts evidence, must be presented for a proper, noncharacter purpose. See State v. O'Neil, 848 P.2d 694, 700-01 (Utah Ct. App. 1993) (holding evidence of distribution conviction was probative of knowledge and intent because defendant charged with distribution but claimed he "knew nothing" about the drugs); State v. Taylor, 818 P.2d 561 (Utah Ct. App. 1991) (holding evidence of marijuana distribution conviction probative of constructive possession because defendant charged with marijuana distribution but was not record owner of cabin or present when marijuana discovered). This is especially true in cases where the defendant is not charged with distribution. For example, in State v. Bisner, 2001 UT 99, 37 P.3d 1073, the defendant was charged with murder. Id. at ¶1. The trial court admitted evidence of the victim's "drug debt to" the defendant. Id. at ¶56. On appeal, our supreme court held the evidence was properly presented to show motive and intent because the "only question for the jury" was whether the defendant killed the victim intentionally or while

"acting 'under an extreme emotional disturbance' caused by his drug use." Id. at ¶57.

Here, the gun and weapon evidence was not offered for a proper, noncharacter purpose. At trial, there was no question that Todd was murdered or that Todd's murder was motivated by drugs. R. 259:488-89. The shooter's motive, opportunity, intent, preparation, plan, knowledge, and absence of mistake or accident were clear—Todd would not return the drugs so the shooter shot Todd to retrieve the drugs. Id. at 500-24. The only question for the jury was the identity of the shooter. Id. at 488-89, 500-24. The State offered the drug and weapon evidence for the purpose of proving Torres-Garcia was "a drug dealer." R. 254:27. Torres-Garcia's status as a drug dealer, however, did not help the jury identify him as the shooter. It did not place Torres-Garcia at the scene of the crime because it did not contain the drugs or weapon involved in the crime. Id. at 8-15, 21-22; see Allen 2005 UT 11 at ¶¶19 n. 4, 20 (holding evidence was presented for noncharacter purpose because it "directly linked" defendant to conspiracy). It did not demonstrate a particular pattern of behavior that tended to link Torres-Garcia to the crime. See Fedorowicz, 2002 UT 67 at ¶¶24-25, 29 (holding testimony describing videotape of defendant "engaged in consensual sexual activities involving the whips and straps allegedly used to inflict [child's] injuries" was presented for noncharacter purpose because established "'pattern of behavior'"); State v. Decorso, 1999 UT 57, ¶27, 993 P.2d 837 (holding evidence of prior crimes was probative of identity because "numerous similarities" suggested "same person committed both crimes"). And it did not distinguish

Torres-Garcia from other possible shooters as the likely perpetrator. See State v. Mead, 2001 UT 58, ¶¶60-62, 27 P.3d 1115 (holding defendant's prior statements that "he would be better off killing his wife than divorcing her," his wife "was going to have an 'accident,'" and he wanted to hire someone "to kill his wife" were probative of defendant's "motive, plan, and intent to kill [his wife]"). Instead, it singled out Torres-Garcia as a bad character who dealt drugs and shot anyone who interfered with his drug business, thereby increasing the likelihood of his guilt in this case. See State v. Webster, 2001 UT App 238, ¶¶35-37, 32 P.3d 976 (holding, in case where defendant charged with stealing car from dealership, that testimony about prior arrest for stealing car from dealership was not probative of noncharacter purpose because record did not show "signature-like similarities" or "sufficient details" to justify conclusion that defendant was acting "pursuant to a common scheme or plan").

B. The Gun and Weapon Evidence Was Not Relevant As Required by Rule 402.

"Bad acts evidence, like all evidence, must be relevant or it is inadmissible." Nelson-Waggoner, 2000 UT 59 at ¶26 (citing Utah R. Evid. 402). "[E]vidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" Fedorowicz, 2002 UT 67 at ¶32 (quoting Utah R. Evid. 401). "Further, even if otherwise relevant as defined by rule 401, evidence is irrelevant and inadmissible under rule 402 if the evidence is material and relevant to prove only the defendant's

proclivity to commit the crime charged." Id. (citation omitted); see State v. Forsyth, 641 P.2d 1172, 1176-77 (Utah 1982) (indicating evidence is not admitted merely because it shows plan, scheme, manner of operation, or the like but that evidence of noncharacter purpose is admissible where it tends to prove some fact material to the crime charged).

In this case, the drug and weapon evidence should have been excluded because it was not relevant except to prove Torres-Garcia's proclivity to commit the crime charged. As explained above, the only issue at trial was identity. See supra Part II.A. Thus, the drug and weapon evidence would only have been relevant if it increased the probability that Torres-Garcia was the shooter. See Decorso, 1999 UT 57 at ¶28 (holding evidence of prior crimes highly probative of material fact—identity—because "numerous similarities" suggested "same person committed both crimes"). The drug and weapon evidence, however, could not increase the probability of Torres-Garcia's guilt because it did not contain the drugs or weapon involved in the crime and it did not demonstrate a pattern of behavior that linked Torres-Garcia to the crime. R. 254:8-15, 21-22. Instead, the drug and weapon evidence simply increased the probability that Torres-Garcia was a drug dealer who hoarded weapons. R. 254:27. This allowed the State to argue and the jury to infer that Torres-Garcia was the shooter because he was a violent drug dealer who often committed crimes like the crime charged. R. 259:487, 527-28, 538.

C. The Gun and Weapon Evidence Did Not Meet the Requirements of Rule 403.

"Under rule 403, evidence can be excluded, even if relevant, 'if its probative value

is substantially outweighed by the danger of unfair prejudice.'" Fedorowicz, 2002 UT 67 at ¶36 (citation omitted). When deciding "whether to exclude otherwise admissible evidence under rule 403," a trial court must consider several factors, including:

the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

Allen, 2005 UT 11 at ¶24 (citations omitted); see State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988).

In this case, the trial court abused its discretion by holding the other crime evidence was admissible under rule 403. First, the strength of the evidence as to the commission of the other crime was weak. At the time of trial, Torres-Garcia had not been convicted of possessing the drug and weapon evidence and, in fact, had a strong defense that the prosecutor could not prove constructive possession. R. 254:8-15.

Second, the charged crime and the other crime were not similar. For this factor to be met, the charged crime and the other crime evidence must share "significant and striking similarities." Nelson-Waggoner, 2000 UT 59 at ¶29; see Fedorowicz, 2002 UT 67 at ¶37 (holding factor met because other crimes evidence "unmistakably similar" to allegations); Decorso, 1999 UT 57 at ¶31 (holding factor met because "signature-like crimes"); State v. Bradley, 2002 UT App 348, ¶31, 57 P.3d 1139 (same). In this case, the charged crime and the other crime evidence were not similar. The charged crime was

murder. R. 4-5. It was a crime of violence that involved entering a person's hotel room and shooting the person in the head. Id. Conversely, the other crime evidence involved possession or distribution. R. 254:6-7. It was a nonviolent crime that occurred over a month after the charged incident and involved Torres-Garcia being arrested in an apartment where drugs and weapons were found. Id.

Third, the State's need for the other crime evidence was low and the efficacy of alternative proof was high. In Decorso, our supreme court held the need for the other crime evidence was "very high" and the "efficacy of alternative proof was very low" because defendant murdered the only witness and the only other evidence was a fingerprint. Decorso, 1999 UT 57 at ¶33. "In short, the other crimes evidence . . . was vital to the State's case." Id. Conversely, in this case, the State's need for the other crime evidence was low and the efficacy of alternative proof was high. At trial, the only question was identity. See supra Part II.A. To prove Torres-Garcia was the shooter, the State had Irwin's eyewitness testimony and Delgado-Cruz's corroborating testimony. R. 256; 258. If the jury believed Irwin's and/or Delgado-Cruz's testimony, then it had sufficient evidence to convict. Id. Thus, the State had no need for the drug and weapon evidence, especially since it did not help establish identity. See supra Part II.A.

Fourth, and most important, the evidence would rouse the jury to overmastering hostility. To avoid rousing the jury to overmastering hostility, trial courts should not admit evidence that suggests a greater "proclivity for violence" or a more "significant

criminal character” than the charged crime. Bisner, 2001 UT 99 at ¶59 (citation omitted); see State v. Widdison, 2001 UT 60, ¶52, 28 P.3d 1278 (holding other crimes evidence would not rouse jury to overmastering hostility because "was no worse than the evidence already before the jury"); Decorso, 1999 UT 57 at ¶34 (holding other crimes evidence would not rouse jury to overmastering hostility because crimes "were minor when compared to the aggravated murder charge in this case" since defendant "did not harm or injure his victim"). In this case, the other crime evidence suggested a much greater proclivity for violence and a much more significant criminal character than the charged crime. Torres-Garcia was charged with shooting one man over a drug dispute. R. 4-5. Conversely, the State presented the drug and weapon evidence to show Torres-Garcia was a drug dealer with a large cache of weapons that he kept for the very purpose of killing anyone that interfered with his business. R. 259:487, 527-28, 538. Although the drug and weapon evidence did not help the jury establish Torres-Garcia’s guilt in this case, it helped the jury infer Torres-Garcia’s guilt in countless similar cases. See supra Part II.A. Thus, the drug and weapon evidence roused the jury to overmastering hostility by allowing it to conclude Torres-Garcia, even if he did not shoot Todd, was deserving of prison because he hoarded weapons and used these weapons to kill anyone who interfered with his drug business. R. 259:487, 527-28, 538.

D. The Admission of the Gun and Weapon Evidence Was Prejudicial Error.

An error is prejudicial if "the likelihood of a different outcome [in the absence of

the error is] sufficiently high [so as] to undermine confidence in the verdict." State v. Adams, 2000 UT 42, ¶20, 5 P.3d 642 (alterations in original) (quotations and citation omitted); see State v. Houskeeper, 2002 UT 118, ¶26, 62 P.3d 444 (holding "an appellate court will not overturn a jury verdict for the admission of improper evidence if the admission of the evidence did not reasonably effect the likelihood of a different verdict").

In this case, Torres-Garcia was prejudiced by the trial court's erroneous admission of the drug and weapon evidence. Had the jury not had the drug and weapon evidence to bolster the State's case, there is a substantial likelihood that it would have acquitted. As explained above, the only issue at trial was identification. See supra Part II.A. To establish identification, the State presented Irwin's eyewitness testimony and Delgado-Cruz's corroborating testimony. R. 256; 258. Both Irwin's eyewitness testimony and Delgado-Cruz's corroborating testimony, however, were questionable.

Although Irwin identified Torres-Garcia as the shooter, the circumstances surrounding her identification were so questionable that its admissibility was questioned below. R. 256:26-27; see State v. Long, 721 P.2d 483, 490 (Utah 1986) (noting "accuracy of an identification is, at times, inversely related to the confidence with which it is made." (citation omitted)). First, Irwin witnessed the shooting after at least two days of ingesting drugs and foregoing sleep. R. 256:26-27; 196-97, 213; see Long, 721 P.2d at 488 (holding eyewitness' "physical condition, including . . . fatigue and drug or alcohol use" affects perception even more than "circumstances of the observation"). In

fact, during her interview with Detective Prior on the night of the incident, the influence of the drugs in her system caused her to repeatedly "nod off" and have "a difficult time telling him what happened." R. 256:196-97. Second, Irwin's attention was likely drawn from the shooter's face because the incident involved guns and a violent attack on her husband. Id. at 168-71; see Long, 721 P.2d at 489 (noting "perceptual abilities are known to decrease significantly" when observer "is experiencing a marked degree of stress"). This accounts for Irwin's testimony that she saw two people holding guns, but that she "[j]ust heard a gunshot" and did not actually see who pulled the trigger. R. 256:170, 198, 203-04; 258:353. Third, her description of the incident and the shooter changed significantly over time. R. 256:194-95, 198, 206-10; 258:254-55, 304, 323-26, 330-31; see Long, 721 P.2d at 490 (explaining eyewitnesses "tend to add extraneous details and to fill in memory gaps over time, thereby unconsciously constructing more detailed, logical, and coherent recollections of their actual experiences"). Most significantly, she completely failed to identify Fernando as the shooter until his name was suggested to her, even though she had talked about Fernando and had claimed she knew Fernando by name and face. R. 256:172, 209; 258:312-13, 319-20, 328-29, 332, 375; see Long, 721 P.2d at 490 (explaining interviewing officers "by using a variety of subtle and perhaps unconscious questioning techniques, can significantly influence what a witness 'remembers' in response to questioning"). Fourth, before Officer Prior asked Irwin to attempt to identify the shooter in a photo array, he told her he had "reason to

believe that one of the people pictured in this group of photographs may in fact be one of the people associated with this incident." R. 258:376; see Long, 721 P.2d at 490 (noting "suggestiveness of police lineups, showups, and photo array"). Moreover, Irwin's personal credibility was questionable. She had recently engaged in a sexual relationship with Delgado-Cruz, another potential shooter. R. 256:178-81. She also admitted she had twice pleaded guilty to providing false information to a police officer. Id. at 177.

Similarly, although Delgado-Cruz corroborated Irwin's testimony, Delgado-Cruz's testimony was questionable. First, Delgado-Cruz admitted he was employed as a drug runner and had been arrested for selling drugs. R. 258:289, 398. He also admitted that he was hoping to get a better deal in exchange for testifying in Torres-Garcia's case. Id. at 410, 420; see Bisner, 2001 UT 99 at ¶¶32, 40 (noting evidence that witness is cooperating with State is potentially "exculpatory evidence"). Second, like Irwin, he testified that two people had a gun and that he did not actually see who shot Todd. R. 258:382, 405, 418. Third, he admitted that he had multiple motives for shooting Todd. R. 258:411-14. Not only was he the person who was entrusted to deliver the heroin and who abandoned the heroin to Todd, he was also the person who was engaged in sexual relations with Irwin and whom Todd did not like. Id.

Thus, the evidence identifying Torres-Garcia as the shooter was questionable and, absent the bolstering effect of the drug and weapon evidence, there was a reasonable likelihood that it would have been rejected by the jury. The prejudicial effect of the drug

and weapon evidence was significantly increased by the way the State presented the drug and weapon evidence to the jury. First, the State called Detective Prior to detail the amounts and types of drugs, weapons and other paraphernalia included in the drug and weapon evidence and, during Detective Prior's presentation, displayed the actual drugs and bag of weapons to the jury. R. 258:293-99. This allowed the jury to infer from the sheer volume of the evidence that Torres-Garcia ran a large drug business and had many guns to kill many people in the protection of that business. Id. Second, the State called Watson to testify that, in his expert opinion, the drug and weapon evidence indicated Torres-Garcia was a significant drug dealer. Id. at 434-36. This expert conclusion emphasized and gave heightened authority to the State's characterization of Torres-Garcia as a violent and dangerous drug dealer. Id. Moreover, Torres-Garcia was forced to let Watson's testimony stand virtually uncross-examined because he did not receive notice of Watson's testimony. Id. at 442; see supra Part I. Thus, the authoritativeness of Watson's testimony multiplied because, in the eyes of the jury, Watson's testimony was so accurate that the defense could not cross-examine it. Id.

Accordingly, there is a reasonable likelihood that the jury would have acquitted Torres-Garcia absent the drug and weapon evidence. In fact, before reaching its verdict, the jury deliberated for over thirteen hours, sent two questions to the judge, and told the bailiff they had nearly reached an "impasse." R. 158-59; 260:3-7, 18-19. In the end, the jury acquitted Babluene-Para, who was not characterized as a drug dealer, and convicted

Torres-Garcia, who was characterized as a drug dealer. R. 260:19-21. This suggests the jury had a very difficult time reaching a verdict and, absent the drug and weapon evidence, likely would not have found enough evidence to convict Torres-Garcia. Id.

Moreover, the trial court's jury instruction did not cure the prejudicial effect of the drug and weapon evidence. The trial court instructed the jury that "[p]roof that the defendant has engaged in a drug business may not be used to show that the defendant is not a truthful person or that he is a murderer." R. 194. This instruction did nothing to mitigate the prejudicial effects of the State's use of the drug and weapon evidence. Id. The State did not admit the drug and weapon evidence simply to show Torres-Garcia had a drug business. The State, as explained in its closing argument, admitted the drug and weapon evidence to show Torres-Garcia was a significant drug dealer who possessed numerous guns and used these guns to kill people who "mess[ed]" with his business. R. 259:487, 527-28, 538. Thus, simply instructing the jury that the fact that Torres-Garcia had a drug business did not mean he was a murderer did not cure the prejudicial effect of admitting the drug and weapon evidence to show Torres-Garcia was a significant drug dealer who kept a cache of weapons specifically for the purpose of killing people who interfered with his drug business. R. 194.

III THIS COURT SHOULD REVERSE BECAUSE THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS UNDERMINES CONFIDENCE THAT TORRES-GARCIA HAD A FAIR TRIAL

"Under the cumulative error doctrine," this Court will reverse "if 'the cumulative effect of the several errors undermines confidence . . . that a fair trial was had.'" State v. Kohl, 2000 UT 35, ¶25, 999 P.2d 7 (citation omitted); see State v. Young, 853 P.2d 327, 367-368 (Utah 1993) ("The doctrine of cumulative error allows for a new trial when standing alone, no error is severe enough to warrant a new trial, but when considered together, the errors denied the defendant a fair trial."). In assessing a cumulative error claim, this Court will "consider all the identified errors, as well as any other errors [it] assume[s] may have occurred." Kohl, 2000 UT 35 at ¶25.

In this case, this Court should reverse because the cumulative effect of the trial court's errors undermines confidence that Torres-Garcia had a fair trial. The trial court erred by allowing Watson to give expert testimony without granting Torres-Garcia a continuance, even though the State did not provide the required notice of expert testimony. See supra Part I. The trial court also erred by admitting the drug and weapon evidence even though it was inadmissible character evidence under rule 404(b). See supra Part II. Individually, these errors prejudiced Torres-Garcia. See supra Parts I, II. First, denying Torres-Garcia a continuance prejudiced his case because it forced him to defend himself without adequately preparing to meet Watson's testimony. See supra Part I. It also hindered his motion practice because he was not sure what the State's case

would or would not entail. R. 256:25-27, 34. Second, admitting the drug and weapon evidence prejudiced Torres-Garcia by characterizing him as a violent and dangerous drug dealer who kept a cache of weapons for the purpose of killing anyone who interfered with his drug business. See supra Part II.

Cumulatively, these errors denied Torres-Garcia a fair trial because they completely undermined his defense. Torres-Garcia filed discovery requests for each of the State's witnesses and particularly for the witnesses who would testify about the drug and weapon evidence. R. 15-17. Based on the discovery he received, Torres-Garcia fully prepared for trial. See supra Part I.B. He developed a defense that focused on the discrepancies in Irwin's testimony and planned his trial strategy around that defense. R. 256:147-50. On the first day of trial, however, Torres-Garcia learned the State would be permitted to call Watson to give expert testimony about drug trafficking even though it had not provided proper notice. R. 256:14-16. Because he was denied a continuance to prepare to meet Watson's testimony, Torres-Garcia proceeded to trial as best he could—using his original defense plan. R. 256; 258. In the end, however, the cumulative errors of denying Torres-Garcia a continuance and admitting the drug and weapon evidence undermined Torres-Garcia's defense strategy and prejudiced his case. Id.

Watson's testimony directly challenged Torres-Garcia's defense because it explained away the discrepancies in Irwin's testimony that Torres-Garcia had emphasized during his opening statement, highlighted during cross-examination, and

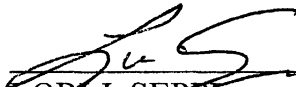
recorded on his chart of important discrepancies to remember. R. 256; 258; 258:437-38.

Watson's testimony also gave heightened authority to the drug and weapon evidence because Watson testified that in his expert opinion the drug and weapon evidence indicated Torres-Garcia was a significant drug dealer. R. 258:434-36. This conclusion gave expert endorsement to the State's characterization of Torres-Garcia during trial and during closing arguments as a dangerous drug dealer who harbored weapons for the purpose of killing people who interfered in his drug business. R. 258:434-36; 259:487, 527-28, 538. This is especially true because Watson was in the courtroom throughout trial, where the jury could see him acting as an expert and interacting with or even advising the prosecutor. R. 256:34. Because the State did not give Torres-Garcia notice of Watson's testimony and the trial court denied Torres-Garcia a continuance, however, Torres-Garcia was forced to leave Watson's testimony virtually uncross-examined. R. 258:442; see supra Part I. Thus, the credibility of Torres-Garcia's defense was significantly diminished because he could not counter Watson's expert testimony that Irwin's discrepancies were inconsequential. Conversely, the State's improper characterization of Torres-Garcia as a dangerous drug dealer who killed people that interfered with his drug business was significantly bolstered because Torres-Garcia could not counter Watson's expert testimony that the drug and weapon evidence indicated Torres-Garcia was a notable drug dealer. R. 258:442. Thus, this Court should reverse because the cumulative effect of the trial court's errors denied Torres-Garcia a fair trial.

CONCLUSION

This Court should reverse Torres-Garcia's conviction because the trial court abused its discretion by denying Torres-Garcia's motion for a continuance and by admitting the drug and weapon evidence.


SUBMITTED this 25th day of March, 2005.



LORI J. SEPP
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, LORI J. SEPPI, hereby certify that I have caused to be delivered eight copies of the foregoing to the Utah Court of Appeals, 450 South State Street, Salt Lake City, Utah 84114, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 25th day of March, 2005.



LORI J. SEPPI

DELIVERED this _____ day of March, 2005.

ADDENDA

Addendum A

3RD DISTRICT COURT - SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 031907945 FS
	:	
SALVADOR TORRES-GARCIA,	:	Judge: ANN BOYDEN
Defendant.	:	Date: August 23, 2004

PRESENT

Clerk: patd

Reporter: WARNICK, SUZANNE

Prosecutor: BERNARDS-GOODMAN, KATHERINE

Defendant

Defendant's Attorney(s): FUELLING, BRENNON

Interpreter: GLORIA UPDEGROVE

DEFENDANT INFORMATION

Language: SPANISH

Date of birth: August 15, 1975

CAT/CIC

Tape Count: 115250

CHARGES

1. MURDER - 1st Degree Felony

Plea: Not Guilty - Disposition: 05/25/2004 Guilty

SENTENCE PRISON

Based on the defendant's conviction of MURDER a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

COMMITMENT is to begin immediately.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

Case No: 031907945
Date: Aug 23, 2004

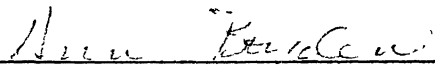
SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

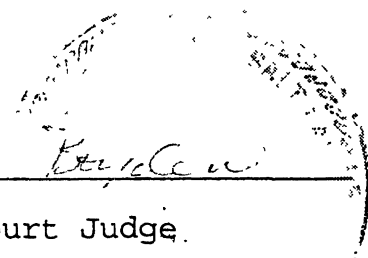
RUN CONSECUTIVELY WITH PRISON SENTENCE NOW SERVING AT UTAH STATE
PRISON SENTENCE

SENTENCE TRUST NOTE

RESTITUTION TO BE THRU BOARD OF PARDONS, \$750 - DESERET MORTUARY,
\$1035 TAYLORSVILLE CEMETARY

Dated this 23 day of August, 2004.


ANN BOYDEN
District Court Judge.



Addendum B

77-17-13. Expert testimony generally — Notice requirements.

- (1) (a) If the prosecution or the defense intends to call any expert to testify in a felony case at trial or any hearing, excluding a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure, the party intending to call the expert shall give notice to the opposing party as soon as practicable but not less than 30 days before trial or ten days before the hearing.
(b) Notice shall include the name and address of the expert, the expert's curriculum vitae, and one of the following:
 - (i) a copy of the expert's report, if one exists; or
 - (ii) a written explanation of the expert's proposed testimony sufficient to give the opposing party adequate notice to prepare to meet the testimony; and
 - (iii) a notice that the expert is available to cooperatively consult with the opposing party on reasonable notice.
(c) The party intending to call the expert is responsible for any fee charged by the expert for the consultation.
- (2) If an expert's anticipated testimony will be based in whole or part on the results of any tests or other specialized data, the party intending to call the witness shall provide to the opposing party the information upon request.
- (3) As soon as practicable after receipt of the expert's report or the information concerning the expert's proposed testimony, the party receiving notice shall provide to the other party notice of witnesses whom the party anticipates calling to rebut the expert's testimony, including the information required under Subsection (1)(b).
- (4) (a) If the defendant or the prosecution fails to substantially comply with the requirements of this section, the opposing party shall, if necessary to prevent substantial prejudice, be entitled to a continuance of the trial or hearing sufficient to allow preparation to meet the testimony.
(b) If the court finds that the failure to comply with this section is the result of bad faith on the part of any party or attorney, the court shall impose appropriate sanctions. The remedy of exclusion of the expert's testimony will only apply if the court finds that a party deliberately violated the provisions of this section.
- (5) (a) For purposes of this section, testimony of an expert at a preliminary hearing held pursuant to Rule 7 of the Utah Rules of Criminal Procedure constitutes notice of the expert, the expert's qualifications, and a report of the expert's proposed trial testimony as to the subject matter testified to by the expert at the preliminary hearing.
(b) Upon request, the party who called the expert at the preliminary hearing shall provide the opposing party with a copy of the expert's curriculum vitae as soon as practicable prior to trial or any hearing at which the expert may be called as an expert witness.
- (6) This section does not apply to the use of an expert who is an employee of the state or its political subdivisions, so long as the opposing party is on reasonable notice through general discovery that the expert may be called as a witness at trial, and the witness is made available to cooperatively consult with the opposing party upon reasonable notice.

UTAH RULES OF EVIDENCE

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes.

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(a)(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(a)(2) *Character of alleged victim.* Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(a)(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the nature of any such evidence it intends to introduce at trial.

(Amended effective October 1, 1992; February 11, 1998; November 1, 2001.)

Addendum C

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District Attorney for Salt Lake County
KATHERINE BERNARDS-GOODMAN, 5446
Deputy District Attorney
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ORIGINAL

IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, UTAH

THE STATE OF UTAH,

Plaintiff,

-vs-

SALVADOR TORRES-GARCIA,

Defendant.

NOTICE OF EXPERT WITNESS

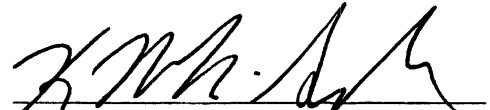
Case No. 031907945FS
Judge ANN BOYDEN

The State of Utah, by and through its counsel, David E. Yocom and Katherine Bernards-Goodman, hereby provides notice pursuant to Utah Code Ann. §77-17-13 (1953 as amended), of the State's intent to introduce expert opinion testimony through Dr. Todd Grey, a Chief Medical Examiner for the Office of the Medical Examiner and Craig Watson, Assistant Chief Investigator for the District Attorney's Office. Dr. Grey, whose curriculum vitae are attached, will be called

to testify concerning the autopsy of the victim. Mr. Watson, whose curriculum vitae are attached, will be called to testify concerning drug trafficking.

DATED this 15 day of April, 2004.

DAVID E. YOCOM
District Attorney for Salt Lake County

A handwritten signature in black ink, appearing to read "K. Bernards-Goodman", written over a horizontal line.

KATHERINE BERNARDS-GOODMAN
Deputy District Attorney

CERTIFICATE OF DELIVERY

I hereby certify that on the 15th day of April, 2004, I caused a true and correct copy of the foregoing Notice of Expert Witness to be mailed to D. Richard Smith, Attorney for Defendant, at 4444 South 700 East, # 101, Salt Lake City, Utah 84107.

A handwritten signature in black ink, appearing to read "W. L. Davis", is written over a horizontal line.

Addendum D

UM-000526

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,

Plaintiff,

vs.

SALVADOR TORRES-GARCIA,

Defendant.

Case No. 031907945

Transcript of:

HEARING ON MOTION IN LIMINE

BEFORE THE HONORABLE ANN BOYDEN

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114-1860

ORIGINAL

MAY 20, 2004

FILED DISTRICT COURT
Third Judicial District

MAY 21 2004

REPORTED BY: ED MIDGLEY

238-7408

FILED

SALT LAKE COUNTY

UTAH APPELLATE COURTS

Deputy Clerk

DEC 13 2004

20040526

1 substantially outweigh the probative effect; certainly outweigh
2 the prejudicial effect under Rule 609.

3 So, if this defendant does testify -- and clearly
4 that's the underlying basis -- then prior convictions are
5 admissible by my ruling today.

6 Secondly, we need to address the defendant's motion
7 to -- regarding the seizure of weapons at the time of the
8 defendant's arrest. The defendant has argued that this should
9 be kept out under Rules of Evidence 404(b). The State has
10 argued two alternative theories, which I think both kind of
11 intertwine, just as the facts intertwine in this case.

12 First of all, the State argues that, really, 404(b)
13 does not apply, because this is an ongoing criminal episode.

14 I have listened to that argument and find that the
15 underlying factors that they argue, why this is a single
16 criminal episode, and that the court can decide that it's a
17 single criminal episode -- even though they have not been
18 charged together -- that the State has chosen not to charge
19 these together, for various reasons.

20 And I'm sure part of those reasons are the very
21 reasons that I do not find that it should come in, in spite of
22 404(b), because it is ongoing criminal episode. While those
23 factors are there, I do not find that Rule 404(b) does not
24 apply.

25 I think it does apply here, and therefore, turning to

1 the alternative theory that the State has argued this under,
2 that 404(b) does apply, and whether or not the evidence of the
3 guns and weapons should be admitted under the 404(b) analysis
4 of the rule, I do find that the evidence of the guns and the
5 evidence of the drugs, while they are not the specific guns or
6 specific drugs that are shown to be involved in the murder case
7 itself, certainly are highly relevant and highly probative of
8 the State's case.

9 The evidence that the defendant was found in the
10 possession of guns, of weapons, and drugs, within weeks after
11 this murder occurred, is highly probative of non-character
12 purposes; specifically, it shows directly the plan or the modis
13 operandi as it is referred to in the State's brief. Rule 404
14 does not actually use the word "scheme" or "specific modis
15 operandi," but it does -- the case law does say that that
16 refers to plan and rule. 404(b) does use the language "prepare
17 and plan."

18 And I find that the evidence of weapons and drugs
19 found on the defendant shortly after this murder does go
20 directly to the State's theory of the plan that was made by the
21 defendant, in that this murder was based on a drug deal that
22 went very, very bad.

23 And so, evidence of the drugs and weapons is directly
24 probative of the defendant's intent, preparation, plan, lack of
25 mistake, or accident in this case.

1 I also find that that evidence goes directly to the
2 non-character purpose of proving identity under Rule 404(b).

3 The State witness who is the widow of the deceased in
4 this case, identified at preliminary hearing -- she identified
5 earlier, but at preliminary hearing -- testified that she
6 identified her husband's killer as a drug dealer who had -- who
7 they had asked for drugs from, and drugs had been delivered.
8 So, clearly, the evidence of the drugs and the guns directly
9 goes to the witness's testimony as to I.D.'ing the defendant in
10 the murder case. And so, it is admissible under those
11 appropriate, non-character purposes.

12 In weighing, which this court must also do, whether
13 or not those appropriate purposes are outweighed again by the
14 highly prejudicial nature, I consider all of the arguments that
15 have been made by both the defendant and the State as well.

16 Again, because this evidence is going to come in,
17 appropriately through the State's witnesses, it affects the
18 prejudicial nature of the evidence coming in through the 404(b)
19 evidence, in that what the jury or trier of fact are going to
20 be hearing is this evidence.

21 Otherwise, the fact that it is so supportive of the
22 identity and the plan, it is directly probative, directly
23 relevant, and I do not find that it is so prejudicial that it
24 outweighs that probativeness or that it rises or would have the
25 potential for raising doubts in the jury or to create

1 hostility. It just simply is not that type of evidence, that
2 type of prejudicial evidence.

3 The fact that this is two separate type of charges,
4 drug charges, as opposed to murder charges, I have considered,
5 because I do think it is important that we do not view this
6 testimony or this evidence in any way to show that because the
7 defendant is a drug dealer, by the testimony that comes in, he
8 is therefore a liar or a murderer; that the evidence of drug
9 offenses does not show that someone is not truthful in the
10 testimony.

11 The veracity -- unless it is shown specifically in
12 the statement that the defendant made, or specifically in the
13 statement of the defendant, the facts surroundings the drug
14 dealing; drug dealing itself has not been determined in
15 precedent case law to be an indicator of veracity.

16 So, when defense counsel argued the statement on Page
17 4, that two prior drug offenses illustrate he is not a truthful
18 person, I agree with the defense there that that is not an
19 indicator as to his veracity. The veracity can only be shown
20 by the very specifics of the statements he made and the facts
21 of the underlying drug offenses.

22 So, if it is being used to show veracity, there needs
23 to be very specific statements and factual bases for why that
24 goes to the truthfulness, rather than simply that there are
25 drug offenses involved. Drug offenses do not address veracity.

1 As, too, the admitting this for the purpose that
2 because he is a drug dealer he is therefore a murderer, that is
3 absolutely inappropriate and will not be allowed in court. The
4 court is not allowing evidence of the drug, or weapons, or
5 prior convictions for 404 purposes, to show that he is of bad
6 character or that he is a drug dealer, or to show that he is a
7 murderer.

8 Again, it is only being admitted for the purposes of
9 showing preparation, plan, intent, identity, absence of
10 mistake, or accident; all of the purposes that are appropriate
11 under 404(b) as non-character purposes.

12 And certainly it may not be argued in any way that
13 because of the prior convictions or the drug possessions or
14 weapons possessions that he is therefore of a character to
15 commit a murder or drug offenses.

16 All of it is to go specifically to the non-character
17 purposes that I have addressed.

18 Therefore, I would ask that, based on this ruling
19 today, that the State prepare a jury instruction that clarifies
20 to the trier of fact the purposes for -- that this type of
21 evidence is being admitted for; and specifically that they may
22 not consider it for character purposes; that it is only being
23 allowed to show the non-character purposes that are allowed by
24 Rule 404(b), and that I have addresses in my ruling today.

25 Is there any question about my ruling, any

1 clarifications?

2 MR. FUELLING: Just a little bit, Judge. The court
3 mentioned the evidence would go to show I.D. Now, it's
4 different guns, and it hasn't been proven that it's the same
5 drugs.

6 So, I guess I'm asking for some clarification as to
7 how the different drugs and different guns would show I.D.
8 specifically.

9 I have a second question. If I heard the court
10 correctly, at the end, the testimony would come in -- I mean,
11 the officer that made the arrest is going to be called
12 separately by the State. When he was arrested, there was a bag
13 of guns and drugs, though not specifically linked to this case.

14 If this is all he says -- and it's my understanding
15 that's all he can say, because if he alludes at all to the fact
16 that, therefore, the defendant is a drug dealer, that's an
17 argument he can't make, or the State can't make.

18 In other words, the court has allowed the evidence to
19 come in, but the State is prohibited at this point from saying
20 that he's a drug dealer based on that evidence.

21 And I guess that conflicts somewhat in my mind. If
22 that comes in under the State's idea that this comes in to show
23 this ongoing drug-dealing operation, then they bring that
24 evidence in, and by virtue of the fact that the drugs and guns
25 come in, and the State, on a separate occasion, argues he's a

1 drug dealer, that nexus is there, and I'm not understanding how
2 that will be separated pursuant to the court's ruling. Does
3 that make sense?

4 THE COURT: I'll ask Ms. Bernards-Goodman to respond
5 as well. But is that a correct proffer of what the State's
6 witnesses are going to testify to? Under 404(b), not under
7 Rule 609, how much evidence is the State planning on putting on
8 in their case in chief?

9 MS. BERNARDS-GOODMAN: The State does intend to call
10 the detective who found the defendant with the guns and drugs,
11 and the they are not the same guns and drugs. That would be
12 the extent of his testimony.

13 The State does have an expert witness, Craig Watson,
14 who is an expert in distribution. The State intends to show
15 that not only are these drugs, but that these are drugs in
16 amounts of distribution. As I've argued before, that's the
17 whole underlying story of this case: The defendant was in
18 possession of a drug business.

19 And while this doesn't say he necessarily is a
20 murderer -- and there will be the jury instruction as to
21 that -- the State does intend to prove that the defendant is a
22 drug dealer.

23 MR. FUELLING: And therein lies the conflict. I
24 mean, the court has made a ruling that this comes in not to
25 prove he's a drug dealer and the State's going to bring an

1 expert in for the specific purpose of saying he's a drug
2 dealer.

3 And so I think that conflict has to be overcome, and
4 I think that is what conflicts with the 404(b) that the court
5 has talked about.

6 THE COURT: I can clarify. My ruling is that this
7 evidence comes in, and that it is not being admitted for the
8 purposes of character testimony to say that a drug dealer is a
9 murderer. But it is coming in under a murder case.

10 And, so, the State, by my ruling -- I am allowing it
11 in for non-character purposes -- is allowing that it may come
12 in through the officer, through cross-examination.

13 It will be clearly shown to the jury that this is not
14 the same drugs, but sounds as though the jury or the State is
15 to bring in also an expert witness to show that the amount and
16 types of drugs that were found on the defendant are consistent
17 with drug dealing, which is absolutely probative on the State's
18 theory in this case, and is being allowed to show preparation,
19 plan, intent, identity, absence of mistake, or accident.

20 And so if that testimony comes in to show all of
21 those indications -- and it sounds like, from what's being
22 proffered by the State, that it will do that -- my ruling
23 allows that.

24 The jury instruction that I'm asking be prepared, and
25 the only instruction that will be given to the jury by this

1 court, is that they are not to use that testimony for character
2 purposes; but, certainly, if that goes to preparation, plan,
3 intent, which is the underlying drug dealing, then it is
4 allowed there.

5 So, I don't know how much clearer I can make that,
6 Mr. Fuelling. I'm allowing it in. I'm allowing it in for
7 non-character purposes. And the identity was clearly to --
8 even though they are not the same weapons and not the same
9 drugs -- the identification made by the defendant, excuse me,
10 by the deceased's wife, as the person who came in to the hotel
11 room and shot her husband was the drug dealer. And so that
12 comes in as well.

13 MR. FUELLING: But that was not the case. I mean, in
14 other words the State's witness is the one who brought drugs in
15 to the home and dealt the drugs. There's a nexus in my client
16 in that she says that she thinks he's the one who she called,
17 even though she called him by a different name.

18 So, the I.D. that he dealt the drugs is incorrect in
19 the State's own case. In other words, they can't I.D. the
20 exact gun; they can't I.D. the exact person; they can't I.D.
21 that he was the person who brought the drugs in because it's
22 clearly a different person.

23 As to preparation and plan, there's no nexus that
24 this drug dealer is the one who dealt the drugs to that place
25 on the same day. Otherwise, we're doing a drug-dealing case.

1 And I guess that's the problem. By virtue of the
2 officer and the expert, character is exactly what is being
3 argued. It's that, "here's the drug dealer, and this is how
4 we're going to show he's the drug dealer," and so character is
5 implicit in that.

6 And therein lies the argument, Judge. If it's a
7 matter of the officer taking the stand and saying, "okay, look,
8 when he was arrested, there were guns --

9 THE COURT: Mr. Fuelling, I understand your argument,
10 and you've argued, again, the theory of the case.
11 Ms. Bernards-Goodman, is there anything specific on that?

12 MS. BERNARDS-GOODMAN: Well, I think he's forgetting
13 about the immediate witness. Maybe Clara doesn't say, "I know
14 the drugs come from him." We have Clara saying, "I know the
15 drugs come from Carlos." Then we have Carlos saying, "I get my
16 drugs from him." There's the connection.

17 THE COURT: I have ruled on this. Because I was the
18 preliminary hearing judge, which is unusual in certain
19 circumstances, but I was in this case, and heard it, I do have
20 that preliminary information of the testimony.

21 But most importantly my ruling here is that all of
22 that evidence comes in for non-character purposes, and what
23 Mr. Fuelling is arguing is certainly the defendant's theory and
24 defense, and will be argued fully and completely, I'm
25 confident, at trial.

1 But the evidence as I have ruled in my ruling today,
2 regarding the seizure of weapons and drugs at the time of the
3 defendant's arrest, is directly enough connected to this case
4 for proper, non-character purposes that they are admitted. And
5 I do want a jury instruction to go that, that it is for
6 non-character purposes.

7 MR. FUELLING: Judge, we will file a motion to
8 reconsider and file a motion or order showing how the court has
9 ruled, because I think we'll need as clear a record as possible
10 for any appeal issues.

11 THE COURT: I think what we need right now, then, is
12 the State to prepare findings as quickly as possible, since
13 this is set for jury next week, and so that the defense has
14 those findings; or at least draft copies.

15 But I will be able to review those copies, those
16 findings, as soon as they are in.

17 MR. FUELLING: If we could get that, I do think that
18 we will file a motion to reconsider based on the findings, but
19 I think it's appropriate that we have those before we proceed,
20 and we'd like as clear a record as possible before that
21 evidence comes in, because I think there probably an appeal
22 issue based on that.

23 MS. BERNARDS-GOODMAN: I have drug court all day but
24 I'll do it.

25 THE COURT: All right. I appreciate it. Anything

Addendum E

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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- SALVADOR TORRES-GARCIA, Defendant.	FINDINGS OF FACTS, CONCLUSIONS OF LAW Case No. 031907945FS Hon. ANN BOYDEN
---------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------

The State, by and through, Katherine Bernards-Goodman, Deputy District Attorney,
herein submits the following:

FINDINGS OF FACT

1. On or about September 23, 2003, John Todd Irwin and his wife, Clara Irwin were in their hotel room at 1865 West North Temple when they decided to call "Carlos" to order some drugs for their personal use.
2. Within a few minutes, Carlos Delgado-Cruz arrived with the drugs for Mr. and Mrs. Irwin. While delivering the Irwins their drugs, Delgado-Cruz noticed a Salt Lake City Police Officer pulling into the parking lot. As a result, Delgado-Cruz left approximately 50 balloons containing drugs with Mr. and Mrs. Irwin and left the scene.

FINDINGS OF FACTS, CONCLUSIONS OF LAW

Case No. 011905278

Page 2

3. Shortly thereafter, Ms. Irwin called the dealer she knew supplied drugs for “Carlos” and told him about the drugs. Mr. Irwin got on the phone and told the dealer he wanted something for “holding the drugs”. No agreement could be reached.
4. Some time later that same evening multiple individuals entered the Irwin’s hotel room, assaulted Mr. Irwin by striking him with a gun and then shot him in the head with the gun.
5. On October 1, 2003 Mr. Irwin died as a result of the gunshot wound.
6. On November 5, 2003 Carlos Delgado-Cruz came forward and told Detective Prior that he was present when Mr. Irwin was shot and that he was the drug runner who delivered drugs to Clara and Todd Irwin. Delgado-Cruz identified Defendants Salvador Torres-Garcia and Elizar Balbuena-Para as the individuals who entered the Irwin’s hotel room and assaulted Mr. Irwin.
7. On November 11, 2003 a search warrant was executed at 1107 West 3900 South #901, the address identified by Carlos Delgado-Cruz as belonging to Defendant Salvador Torres-Garcia. Mr. Torres-Garcia was located in the residence, along with drugs and guns.
8. On November 13, 2003 Clara Irwin identified Defendant Salvador Torres-Garcia as the individual who shot her husband on September 23, 2003 from a photo spread. She later identified Mr. Torres-Garcia at a line-up and again at preliminary hearing.
9. Defendant Torres-Garcia now seeks through Motion in Limine to exclude the evidence of the drugs and guns located upon his arrest as well as evidence regarding his prior convictions. After review of the motions and hearing arguments, the court makes the following:

CONCLUSIONS OF LAW

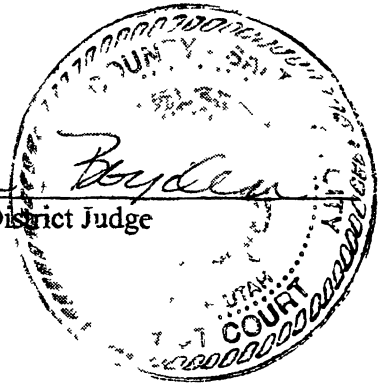
1. Defendant's prior convictions qualify under Utah Rule of Evidence 609 for admission for impeachment purposes, if defendant chooses to take the stand.
2. Defendant's prior convictions are felonies and occurred within the last 10 years.
3. Defendant's prior convictions are for drug offenses.
4. Defendant's prior convictions are extremely relevant to this case due to the fact that the case revolves around an alleged drug business conducted by Mr. Torres-Garcia.
5. Due to the fact that the jury will be hearing evidence regarding this drug business through the testimony of state's witnesses, Defendant's prior drug convictions will not be more prejudicial than probative.
6. Evidence of the weapons and drugs found with the Defendant upon his arrest qualify for admissible evidence under Utah Rule of Evidence 404(b).
7. While the guns and drugs were not the same drugs or same gun involved in the homicide, they are probative for the non-character purposes of proving identity, intent, plan, preparation and lack of accident.
8. Specifically the drugs and guns show a plan, a modis operendi, or scheme engaged in by defendant to conduct and protect a drug business.
9. The evidence will not be more prejudicial than probative due to the fact that the jury will already hear this evidence through the testimony of state's witnesses.
10. Neither is this evidence of the sort that should raise the jury to overmastering hostility.

DATED this 20th day of May, 2004.

ANN BOYDEN, District Judge

Approved as to form.

Brennan Feuling



FINDINGS OF FACTS, CONCLUSIONS OF LAW

Case No. 011905278

Page 5

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Findings Of Facts,
Conclusions Of Law was delivered to Brennan Fueling, LDA.

On the ____ day of.

Addendum F

09-007026

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

VS.

SALVADOR TORRES-GARCIA,

Defendant.

CASE NO. 031907945

MOTION HEARING

FILED DISTRICT COURT
Third Judicial District

OCT 20 2004

By Bn SALT LAKE COUNTY

Deputy Clerk

BEFORE THE HONORABLE ANN M. BOYDEN

SCOTT M. MATHESON COURTHOUSE

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114-1860

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MAY 24, 2004

REPORTED BY: TEENA GREEN, CSR, RPR

238-7104

FILED
UTAH APPELLATE COURTS

DEC 13 2004

20040815-CA

1 haven't heard what that is. Otherwise, there's no basis for
2 calling an expert.

3 **THE COURT:** Any further response?

4 **MS. BERNARDS-GOODMAN:** I'd submit it.

5 **THE COURT:** Thank you. I do agree with Mr. Mack's
6 assessment that there is not bad faith in this. In fact, the
7 State has in fact submitted notice of the expert testimony, it
8 was done in a timely fashion, there were no specific reports to
9 attach so that they could not comply with that and they have
10 stated a statement of what Mr. Watson's testimony would be and
11 that he would be called to testify concerning drug trafficking.

12 Clearly, that is a general statement as to what it
13 is. I think it is not unfair to say that it could be implied
14 or understood by the defense with the information on the case
15 what the theory is, and particularly with the responses in
16 motions in limine that we have done already. But the issue I
17 need to address is whether or not the defendant has had an
18 opportunity to fully prepare for expert testimony given the
19 information that the defense and the defense counsel
20 particularly has received in this case. And I am inclined, in
21 any case that carries with it the kind of penalty -- this is a
22 first degree felony, it is a homicide case, it is not something
23 where the expert testimony is going to be particularly complex,
24 but it does need to at least be sufficient as the rule requires
25 for the opposing side to prepare against it.

1 The statement that has been made is general and I can
2 only rely on the response of the defense whether it's
3 disingenuous or not. I'm not too concerned, I have not
4 received any indication that it is or that counsel has been
5 disingenuous.

6 I do know that we have had hearings and pretrials and
7 addressed these issues and I think that the defense probably
8 had a pretty good idea of what the State's theory is, and
9 particularly with the motions in limine. But the motion in
10 limine was last week, Thursday, and so it does not give
11 sufficient time to prepare, I guess, a notice. If the defense
12 is stating it on the record, I can only take in good faith
13 their statements that they did not receive sufficient
14 information as the rule requires to determine what this expert
15 testimony is.

16 The remedy is continuance or notice or time for
17 preparation. Is it necessary to continue the case? I mean,
18 you did get that indication on Thursday, there are not
19 extensive reports.

20 Mr. Mack, is it your statement to the court and your
21 understanding that this really does mean more time to prepare?

22 **MR. MACK:** Your Honor, I think that we would require
23 additional time. Still we would like to see some sort of
24 summary. I think that maybe once we see that then there would
25 be the necessity of having a Rimmasch hearing or the

1 opportunity at least to consult an expert of our own in some
2 sort of rebuttal. But, you know, we still don't know any more
3 than what has been read into the record, that he's going to
4 talk about drug trafficking. I think it needs to be fuller
5 than that and I think, yes, we do, I guess depending what he
6 says, especially, require additional time to counter that.

7 **THE COURT:** And I believe that the response of
8 defense counsel at that time was what I needed to have on the
9 record before ruling that in fact the whole underlying purpose
10 behind this kind of notice in expert testimony is so that the
11 opposing party can counter expert testimony, whether that's
12 through testimony of their own witnesses of their own, or a
13 scientific reliability argument. And without any of that being
14 done within the time frame that's necessary, what I'm working
15 in the back of my mind is that that information really was
16 provided at the Thursday hearing and this testimony may not
17 even be until Thursday of this week, but that undermines the
18 purpose of the rule in notice and I need to rule that in fact
19 the opposing party in this case has stated in good faith and I
20 am satisfied that they would not be able to prepare to counter
21 the expert testimony concerning drug trafficking.

22 There has been no motion made as far as the expert
23 testimony with the medical examiner in this motion; correct?
24 Even though the underlying argument that you did not receive
25 the notice of expert witness, does that argument also pertain

1 to the expert testimony of Dr. Todd Grey?

2 **MR. MACK:** No, because we have his resumé on file, we
3 have the autopsy report. And I think, although he wasn't
4 called at the preliminary hearing, there was some discussion
5 and waiver of his testimony at the preliminary hearing, which I
6 think complies with -- there is other provisions in the notice
7 statute that indicate that that satisfies compliance.

8 **THE COURT:** I turn the ball back over, then, with
9 that ruling that there does need to be more time for
10 preparation to counter the expert testimony of Investigator
11 Watson. Does the State wish to respond or to go forward
12 without that expert testimony? The delay and need for
13 continuance is only specifically to the testimony of the
14 assistant chief investigator.

15 Mr. Fuelling stated that regardless of my ruling on
16 the 404(b) that the defense was ready to go forward, but that
17 involved a different issue. And that may be part of why the
18 State is proceeding in the way they are, because I made my
19 ruling that I did on Thursday.

20 Does the State wish to go forward with this trial
21 without that expert testimony or do we need to continue this?

22 **MS. BERNARDS-GOODMAN:** I guess we need to continue.

23 **THE COURT:** Certainly it is the burden on the State
24 to proceed as they need to proceed and they have in fact filed
25 the timeliness, it is just simply the issue of whether or not

Addendum G

0m-a0/a2b

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

VS.

SALVADOR TORRES-GARCIA

Defendant.

CASE NO. 031907945

TRIAL DAY ONE

FILED DISTRICT COURT
Third Judicial District

OCT 28 2004

By *BM* SALT LAKE COUNTY

Deputy Clerk

BEFORE THE HONORABLE ANN M. BOYDEN

SCOTT M. MATHESON COURTHOUSE

450 SOUTH STATE STREET

SALT LAKE CITY, UTAH 84114-1860

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MAY 25, 2004

REPORTED BY: TEENA GREEN, CSR, RPR

238-7104

FILED
UTAH APPELLATE COURTS

DEC 13 2004

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1 didn't get it through their office, notice of our experts. And
2 if they want to say acquired street knowledge is not expert
3 knowledge, then I guess we can put the witness on and -- notice
4 other than our witness list. So I think the State has provided
5 adequate knowledge. This is not of such a unique or scientific
6 type that it would require months of preparation, and I think
7 the State should be allowed to use their witness.

8 **MR. MACK:** If I may reply briefly.

9 The police reports, Judge, we have. We have the
10 police reports. There is no report from Watson. So that's not
11 really fair to say that that puts us on notice as to what the
12 witness they may choose to call might say. I would hope you
13 would ask Mr. Cole on the record if he received notice.

14 **THE COURT:** This objection or the motion that was
15 made that we addressed yesterday was at a pretrial conference
16 yesterday that was made by Mr. Mack and there has been no
17 motion made by Mr. Cole on behalf of Eliazar Babluene-Para. My
18 ruling yesterday addressed the issues that were before me and
19 my reconsideration will simply be addressing those issues.

20 Mr. Cole may have the benefit of the record at a
21 later time for anything he wishes to put on the record, but we
22 are addressing this motion and this objection that was made by
23 defense counsel on behalf of Mr. Torres-Garcia.

24 When I ruled yesterday, it was on the very
25 specific objection that the State had not complied with

1 77-7-13.1(b)(ii). I know that's a lengthy citation, but that
2 is the very specific part of the code where a written
3 explanation of the expert's proposed testimony sufficient to
4 give the opposing party adequate notice to prepare to meet the
5 testimony is required for expert testimony. It is clearly the
6 underlying basis of the case law that in fairness before expert
7 testimony can be used, because of the very nature of expert
8 testimony, there needs to be a sufficient opportunity for the
9 opposing party to review, counter and prepare for expert
10 testimony. That argument was made based on the fact that that
11 is the required notice for expert testimony generally.

12 There was argument made by the defense that they had
13 not received a copy of the notice. There is one filed in the
14 court and it appears on the surface of the filing that there
15 clearly was notice given. My ruling yesterday addressed the
16 fact that the notice was given and that the State was not going
17 to be penalized for the fact that it may not have been
18 disbursed through LDA. It is appropriate that if Mr. Cole
19 wishes to place on the record that he did not get it as well,
20 the record still would reflect today that I am addressing
21 subsection (ii), is what that is, as to the written
22 explanation.

23 My ruling was that the written explanation that had
24 been given by the State simply referred to the name of the
25 expert witness and that his testimony would be regarding drug

1 trafficking. There was also attached the vitae of Mr. Watson,
2 and that was the full extent of the notice that was given. I
3 ruled upon the argument of the defense that a general statement
4 that he would be testifying considering drug trafficking did
5 not meet the requirement in sub (ii), that it needed to be
6 sufficient explanation of the proposed testimony to give the
7 opposing party adequate notice.

8 The motion to reconsider is dealing specifically with
9 the issue of whether or not that notice is required under these
10 circumstances. The expert that is involved in this case is a
11 State employee, and subsection 6 of that 77-17-13 statute
12 clearly states that this section does not apply to the use of
13 an expert who is an employee of the State, and then gives the
14 restrictions that do apply there.

15 The underlying issue here is notice. The underlying
16 issue is, in fairness, has the opposing party had an
17 opportunity to adequately and properly prepare for the
18 testimony that the proposing party, the State in this case,
19 wishes to get in through their expert witness, who they have
20 characterized as an expert witness, Craig Watson. The
21 restrictions in subsection 6 is that it needs to be reasonable
22 enough through general discovery through other means so that
23 they can adequately prepare. And that is the bottom line and
24 the issue that I will rule on at this time.

25 This issue has been involved in motions to suppress,

1 it has been involved in discovery, it has been involved in
2 yesterday's motion as to what Craig Watson would be testifying
3 regarding drug trafficking. That is part of the theme of the
4 State's proposed case that the underlying basis for this murder
5 charge that we are dealing with today is the drug trafficking
6 that was underlying it.

7 I have heard these motions, I have addressed them at
8 length, they have been argued, they have been briefed by the
9 opposing party in this case, defense counsel for
10 Mr. Torres-Garcia, and everyone is aware through general
11 discovery and through motions what this general nature of the
12 testimony that is being proffered through Craig Watson would
13 be.

14 The question still remains whether or not there has
15 been reasonable notice. Because there was an objection made
16 that it was not under the expert testimony general notice so
17 that there could not be additional hearings requested or
18 additional controverting expert testimony, I ruled that on
19 subsection 2 that had not been met and the remedy was for more
20 time, and the State elected to go forward without the use of
21 that testimony.

22 Now that subsection 6 has been brought to the court's
23 attention and has been argued here, it is clear that the ruling
24 that I made yesterday was based on a notice requirement that is
25 not required as to the investigator Craig Watson. I am

1 modifying my ruling. The testimony of Craig Watson has been
2 clearly given through general discovery as well as through the
3 motions that have been discussed at length in court and briefed
4 at length in court.

5 Also, this is the first day of what is scheduled to
6 be a four-day jury trial. I am going to order that the State
7 not call that witness -- I'm not going to allow that they call
8 that witness until defense has had an opportunity to speak with
9 him during the course of this trial. That may mean that the
10 attorneys have to do some work outside of the trial time. That
11 is simply a given in a homicide trial.

12 This homicide trial now needs to be everyone's first
13 priority. There are not going to be explanations given that
14 attorneys need to be in different courts or that they didn't
15 have an opportunity to speak with the witness. The witness is
16 here, the witness is available, and I am ordering him available
17 to all three of the defense counsel so that they may fully and
18 completely brief him and get an understanding of what his
19 testimony is and prepare for that cross-examination.

20 But because subsection 6 clearly states that the rule
21 in subsection 1(b) does not apply to this particular witness, I
22 am modifying that order. But there still needs to be
23 reasonable notice, there still needs to be a reasonable
24 opportunity for the opposing party to prepare, and that is to
25 occur this week during trial before I will allow Mr. Watson to

1 be called to the stand.

2 Ms. Bernards-Goodman, when does the State anticipate
3 calling Mr. Watson?

4 **MS. BERNARDS-GOODMAN:** We did anticipate Mr. Watson
5 would be our last witness, so if we get through everything
6 quick, it will be the end of tomorrow, probably Wednesday.

7 **THE COURT:** All right. Thank you.

8 **MS. BERNARDS-GOODMAN:** Thursday.

9 **THE COURT:** With that proffer, then, the opposing
10 parties are on notice that they need to get that preparation
11 and discussion done tonight, and that will be expected.

12 Is there anything else that we need to address on the
13 record, Mr. Cole?

14 **MR. COLE:** Yes, Your Honor. I didn't actually get
15 notice of any expert witness or of Mr. Watson. Now, I wasn't
16 involved in those motions at all and I haven't had a chance to
17 even talk to Officer Watson. I don't know that a day is
18 sufficient time for me to prepare, much less get a rebuttal
19 witness against Mr. Watson. Since he's a State expert, I
20 object to it and would ask for a continuance of the trial.

21 **THE COURT:** Any response, Ms. Go Bernards-Goodman?
22 Was the notice sent to Mr. Cole's office and Mr. Smith's
23 office?

24 **MS. BERNARDS-GOODMAN:** It's my understanding that
25 everything we have sent on this case has gone to both offices.

1 **MR. COLE:** And that's not entirely true, Your Honor.
2 For the CDs and tapes I was told when I showed up at the
3 line-up for one of the defendants that we were, quote, unquote,
4 Going to have to fight over who got a copy of them, ended up
5 having to give Detective Prior copies or a blank audio tape and
6 blank CD roms to get copies of those. So there is obviously a
7 problem with discovery in this particular matter.

8 **THE COURT:** It is the order of the court that you now
9 take advantage of the time that has been set and given, and
10 Mr. Watson will not be called until the defense attorneys have
11 had an opportunity. As to the objections that that may not be
12 enough time, this matter has been set for multiple pretrial
13 hearings, Mr. Cole has not been present at those pretrial
14 hearings and was not present at the hearing yesterday. The
15 court is giving him as much notice as can reasonably be given
16 under the circumstances, and that is the ruling in this case,
17 the notice that is required in subsection 6. And I want that
18 discussion to occur tonight before the State completes its case
19 and gets to a point of its last witness.

20 All right. I don't believe that there are any other
21 motions that have been brought before me. Again, I have
22 received a copy of the requested proposed jury instructions
23 from the State.

24 Mr. Mack or Mr. Fuelling, have you got any proposed
25 jury instructions at this time?